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No. _____

In The

Supreme Court of the United States

CHARLES SIMMONS, et al.,

Petitioners,

v.

UNOCAL CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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ED.

QUESTIONS PRESENTED FOR REVIEW

1. Under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801, *et seq.*, does a market withdrawal decision occur only when an oil company's board of directors formally approves it, or is there a more practical and less formalistic standard?

2. Does it constitute unlawful discrimination under the PMPA for an oil company to offer to operators at newly acquired service stations replacement franchises that contain provisions materially different from those in its existing franchises?

3. Do oil company franchisees, who have become direct purchasers from an acquiring oil company, have standing under the Sherman Act, 15 U.S.C. § 1, to assert that the sale of their service station premises to the acquiring oil company was pursuant to a market allocation conspiracy aimed at reducing output and raising wholesale and retail motor fuel prices?

4. Do oil company franchisees, who are direct purchasers from their franchisor, have standing to assert claims under the Sherman Antitrust Act, 15 U.S.C. § 1, that their franchisor has engaged in price-fixing with other oil companies with regard to wholesale motor fuel prices?

5. Do oil company service station franchisees, who have become direct purchasers from an acquiring oil company, have standing under the Clayton Antitrust Act, 15 U.S.C. § 18, to assert that the sale of their service

QUESTIONS PRESENTED FOR REVIEW – Continued

station premises and other assets to the acquiring oil company may result in a substantial lessening of competition in wholesale and retail motor fuel markets in California?

PARTIES TO THE PROCEEDINGS BELOW

CHARLES SIMMONS; YOSUF HOMAYUN; SEUNG K. CHOI; DAVID AVISRUR; MEHRAN (MIKE) HARIRI; MEIR BEN-DAVID; FRED PAKZAD; A.H.B. PROPERTIES, INC.; MANASSEH BAREH; OMID BADAKHSH; DALLA, INC.; ASGHAR KHOLDI; STEVEN TEDESCO; AKBAR AKRAMI; S.M.B. CORPORATION; JAVAD S. TAAT; SABOUR ANDKHOY; WARM SPRINGS UNOCAL, INC.; BASIR ANDKHOY; LAWRENCE E. RAETHER; ATA TAJYAR; ALI MAJDI; SAGAHOH, INC.; MANSOUR GHNEEIAN; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; SAYED HASHEMYAR; GEORGE BENJAMIN; JOHN OTTE; KEVORK KASBARIAN; and TOROS DEURDULIAN, Petitioners.

UNOCAL CORPORATION; UNION OIL COMPANY OF CALIFORNIA; 76 PRODUCTS COMPANY, INC.; and TOSCO CORPORATION, Respondents.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS BELOW iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES & CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 8

A. History and Purpose of the PMPA 10

1. Unocal Violated the PMPA by Deciding to Withdraw From California Prior to Entering Into or Renewing Petitioners' Franchises 13

2. Tosco's Franchise Offers to the Petitioners Were Discriminatory Under the PMPA ... 15

B. The Ninth Circuit Erred in Affirming the District Court's Grant of Summary Judgment With Respect to Petitioners' Sherman Act Antitrust Claims 18

1. Petitioners Have Standing to Assert Their Sherman Act Claims 18

2. Petitioners Have Standing to Assert Their Clayton Act Claims 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES:

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 21

Brach v. Amoco Oil Co., 677 F.2d 1213 (7th Cir. 1982) 11

California v. American Stores, 495 U.S. 271 (1990) ..22, 23

Ellis v. Mobil Oil, 969 F.2d 784 (9th Cir. 1992) 11

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 21

Humboldt Oil Co., Inc. v. Exxon Co., U.S.A., 695 F.2d 386 (9th Cir. 1982) 11

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 21

Khorenian v. Union Oil Co. of Cal., 761 F.2d 533 (9th Cir. 1985) 11, 13

Nelson v. Monroe Regional Medical Center, 925 F.2d 1555 (7th Cir. 1991) 22

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 21

Roberts v. Amoco Oil Co., 740 F.2d 602 (8th Cir. 1984) 11

STATUTES & CONSTITUTIONAL PROVISIONS:

28 U.S.C. § 1254, 62 Stat. 928, as amended (1988) ..2, 28

Clayton Antitrust Act, § 7, 38 Stat. 731, as amended, 15 U.S.C. § 18 (1996) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*, 92 Stat. 322, *et seq.*, as amended (1994) ..... *passim*

Sherman Antitrust Act, §§ 1, 2, 36 Stat. 209, as amended, 15 U.S.C. §§ 1, 2 (1990) 1, 2, 3, 8, 9, 18

OTHER AUTHORITIES:

Brown, *Franchising – A Fiduciary Relationship*, 49 Tex. L. Rev. 650 (1971)..... 11

Senate Report No. 95-731, 95th Cong. 2d Sess. 15, *reprinted in* 1978 U.S. Code Congressional & Administrative News, 873, 874..... 11

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered with respect to two related matters filed in the United States District Court for the Central District of California.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit rendered an opinion that was filed on May 18, 1999, in which it addressed Petitioners' claims under the PMPA, 15 U.S.C. § 2801, *et seq.* A copy of this opinion is attached hereto as Appendix ("Apdx.") A, pp. 1-35. The Ninth Circuit filed a separate memorandum on May 18, 1999, in which it addressed Petitioners' claims under the Sherman Act, 15 U.S.C. § 1, and Clayton Act, 15 U.S.C. § 18. A copy of this opinion is attached hereto as Appendix B, pp. 36-40.

JURISDICTION

The relevant judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 15, 1999. A copy of that judgment is attached hereto as Appendix C, pp. 41-42. On June 30, 1999, the Ninth Circuit denied Petitioners' application for rehearing *en banc*. A copy of that order is attached hereto as Appendix D, pp. 43-45. Petitioners have timely filed this petition for

writ of certiorari, which invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES & CONSTITUTIONAL PROVISIONS INVOLVED

The following statutes and Constitutional provisions are involved in this case and are set forth in Appendix E:

> Sherman Antitrust Act, §§ 1, 2, 36 Stat. 209, as amended, 15 U.S.C. §§ 1, 2 (1990) (Apdx. E, pp. 46-47)
>
> Clayton Antitrust Act, § 7, 38 Stat. 731, as amended, 15 U.S.C. § 18 (1996) (Apdx. E, pp. 47-49)
>
> Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*, 92 Stat. 322, *et seq.*, as amended (1994) (Apdx. E, pp. 50-77)
>
> Jurisdiction and Venue, 28 U.S.C. § 1254, 62 Stat. 928, as amended (1988) (Apdx. E, p. 78)

Documents reproduced in the Appendix are contained in Appendix G.

STATEMENT OF THE CASE

Concentration is occurring at an accelerating, alarming, and unprecedented pace in the gasoline industry, unseen since the days of the original Standard Oil trust, notwithstanding the passage by Congress of statutes specifically intended to protect and safeguard those affected by such consolidation. There are of course the

United States antitrust laws, including §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and § 7 of the Clayton Act, 15 U.S.C. § 18. Additionally, in 1978, Congress passed the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*, intended as a Bill of Rights for oil company franchisees. This Court has never reviewed a decision involving the PMPA, or construed its terms. In the absence of direction from this Court, lower federal courts, including the Ninth Circuit here, have increasingly read the PMPA as a Bill of Rights for oil companies, and have taken away from franchisees the very rights Congress intended them to have. The lower courts have likewise failed to give the antitrust laws their intended scope in protecting the rights of oil company franchisees injured by the effects of consolidation. The judgment at issue here raises the question of whether any of the protections Congress intended for franchisees will remain under these laws, or whether the lower courts will be permitted to construe away all such protections, while gasoline prices soar. This Court's guidance is important and necessary in this area.

The relevant actions arise out of the decision of respondents Unocal Corporation and Union Oil Company of California (collectively "Unocal") to sell their West Coast marketing assets to respondent Tosco Corporation ("Tosco") and withdraw from marketing motor fuel in several western states, including California. Petitioners are former Unocal franchisees whose service station premises were sold to Tosco in conjunction with Unocal's market withdrawal from California.

The material facts relating to the questions presented for review are as follows.

On October 25, 1995, well over a year before Unocal's announced market withdrawal, the *Los Angeles Times* and *Orange County Register* newspapers reported that Unocal was seeking to divest its West Coast marketing assets. In response, Roger Beach, the Chairman and CEO of Unocal, wrote the following to Unocal's service station franchisees:

> Today, news stories in the Orange County Register and Los Angeles Times stated that Unocal is planning to "sell, spin off or find a partner" for 76 Products Company by 1998. I'd like to comment on these assertions and clarify our intentions.
>
> The information in the stories came from an interview I gave in New York last week. The discussion centered on Unocal's growth strategy for the years ahead – that is, to focus on high-potential resource development projects, primarily overseas.
>
> In line with this strategy, we've sold peripheral businesses, reduced our ownership stake in others, and have announced the pending sale of our California upstream assets. *Ultimately, we expect to change the ownership structure of our West Coast downstream operations as well.* This could be accomplished through a partnership, a joint-venture arrangement, a stock offering, or a sale of 76 Products Company. *This is an intention we've stated many times before, and is nothing new.*

(Apdx. G, p. 86) (emphasis added).

In a July 9-10, 1996 report prepared for a 76 Products management meeting, the author stated that "Unocal

remains committed to shedding 76 P [76 Products Company] at the 'right price'." (Apdx. G, p. 95.)

On November 18, 1996, Unocal and Tosco publicly announced that Unocal had agreed to sell its West Coast marketing assets to Tosco. (Apdx. G, pp. 87-91.)

Shortly thereafter, Unocal, Tosco, and other large oil companies operating in the state of California raised the average price of regular unleaded gasoline in the state of California by over 10 cents per gallon. (Apdx. G, pp. 91-94.)

By letter dated December 26, 1996, Unocal notified the Petitioners and its other approximately 500 independent service station franchisees in California that Unocal was terminating and non-renewing their franchisee agreements and franchise relationships with Unocal effective June 30, 1997. The reason given by Unocal for the termination and nonrenewal of its franchise agreements with the Petitioners was that Unocal had decided to "withdraw from the marketing and sale of motor fuel products in the state of California," in connection with the sale of its West Coast assets to Tosco. (Apdx. A, p. 10.)

On January 9, 1997, Unocal filed suit in the United States District Court for the Central District of California against a group of its franchisees, seeking a declaratory judgment that its market withdrawal from California and sale of its marketing assets to Tosco did not violate the PMPA.

On March 19, 1997, Petitioners filed suit against Unocal and Tosco in the United States District Court for

the Central District of California, claiming that Unocal and Tosco had violated the PMPA and the antitrust laws.

Petitioners claim that Unocal's sale of their service station premises to Tosco violated the PMPA because Unocal had actually decided to withdraw from California prior to entering into and renewing franchise agreements with Petitioners. Petitioners also claim that Tosco violated the PMPA by making replacement franchise offers that contained discriminatory terms and conditions compared to Tosco's agreements with its other franchisees in California. Petitioners further claim that Unocal's sale of their service station premises to Tosco was part and in furtherance of a national market allocation conspiracy involving Unocal, Tosco, and other large oil companies in the United States; and that Unocal, Tosco and other large oil companies operating in California have agreed to fix the price of wholesale motor fuel sold to Petitioners and their other California franchisees. Finally, Petitioners claim that Unocal's sale of its West Coast marketing assets to Tosco violates Section 7 of the Clayton Act, 15 U.S.C. § 18, because the sale may result in a substantial lessening of competition in the wholesale and retail motor fuel markets in California.

On April 2, 1997, Unocal filed another declaratory relief action in which it named each Petitioner as a defendant, with the exception of Toros Deurdulian and Kevork Kasbarian.

On or about April 4, 1997, Tosco delivered PMPA replacement franchise offers to the Petitioners that contained terms and conditions that were different from the terms and conditions in Tosco's leases with its other

California franchisees. For example, Section 3 of the Tosco California lease with its franchisees that operate BP branded service stations provides that the franchisee's rent shall remain the same throughout the term of the lease. (Apdx. G, pp. 99-100.) Section 3 of the Tosco lease offered to the Petitioners, however, provides for yearly rent increases based on a formula using the Consumer Price Index. (Apdx. G, pp. 104-105.)

According to Richard Hamlin of Tosco, after acquiring Petitioners' service stations from Unocal, Tosco held internal meetings to formulate the franchise agreements that would be offered to Petitioners. (Apdx. G, pp. 105-116.) Although Tosco's California "BP dealer" franchise agreements were discussed and reviewed during these meetings, Tosco offered different franchise agreements to Petitioners. (*Id.*)

On May 19, 1997, Tosco moved for partial summary judgment with respect to Petitioners' antitrust claims. Unocal filed an identical motion on July 1, 1997. The district court granted both motions on July 28, 1997, without permitting any antitrust discovery.

On March 9, 1998, respondents Unocal and Tosco filed separate motions for summary judgment with respect to Petitioners' PMPA claims; and on March 20, 1998, Unocal moved for summary judgment with respect to its claims for declaratory relief.

The district court granted Unocal's and Tosco's motions for summary judgment. On June 3, 1998, final judgment was entered with respect to Petitioners' antitrust and PMPA claims against Unocal and Tosco. The district court also entered final judgment on Unocal's

declaratory relief claims on June 12, 1998. Both judgments are attached hereto in Appendix F, pp. 79-85.

Petitioners then appealed the district court's judgments to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit rendered an opinion that was filed on May 18, 1999, in which it addressed Petitioners' and Unocal's PMPA claims. (Apdx. A, pp. 1-35.) The Ninth Circuit also filed a separate opinion on May 18, 1999, in which it addressed Petitioners' claims under the Sherman Act, 15 U.S.C. § 1, and Clayton Act, 15 U.S.C. § 18. (Apdx. B, pp. 36-40.)

On June 30, 1999, the Ninth Circuit denied Petitioners application for rehearing and suggestion for rehearing *en banc*. (Apdx. D, pp. 43-45.) The Ninth Circuit's judgment affirming the district court was entered on July 15, 1999. (Apdx. C, pp. 41-42.) Petitioners have timely filed this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

This case involves questions of exceptional importance under the PMPA, 15 U.S.C. § 2801, *et seq.*, Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 7 of the Clayton Act, 15 U.S.C. § 18. With respect to Petitioners' and Unocal's PMPA claims, the Ninth Circuit has decided important questions that have not been, and should be, settled by this Court. With respect to Petitioners' antitrust claims, the Ninth Circuit has decided federal questions in a way that conflicts directly with this Court's applicable decisions.

In the face of undisputed evidence that respondent Unocal for several years sought to divest Petitioners' service station premises to another oil company, and that the only way to effect such a sale in compliance with the PMPA was in conjunction with a market withdrawal, the Ninth Circuit nonetheless affirmed the district court's finding that Unocal's decision to conduct a market withdrawal from California did not occur until Unocal's board of directors formally approved the sale of its West Coast assets to respondent Tosco.

Similarly, notwithstanding undisputed evidence that Tosco's PMPA replacement franchise offers to the Petitioners contained a different rent calculation formula from the formula contained in Tosco's franchise agreements with its other California franchisees, the Ninth Circuit ruled that Tosco's franchise offers to the Petitioners were not discriminatory under the PMPA.

The Ninth Circuit also affirmed the district court's ruling that Petitioners do not have standing to assert, under Sherman Act § 1, 15 U.S.C. § 1, that Unocal's sale of Petitioners' service station premises to Tosco was part and in furtherance of a national market allocation conspiracy, a purpose of which is to raise, peg, or fix wholesale motor fuel prices to Petitioners, direct purchasers from Unocal and Tosco.

The Ninth Circuit further held that Petitioners do not have standing to assert claims under Section 1 that Unocal, Tosco and other large oil companies have engaged in price-fixing with regard to the wholesale motor fuel prices charged to Petitioners and other franchisee service station operators in California.

Finally, the Ninth Circuit held that the Petitioners do not have standing to assert claims that Unocal's sale of its West Coast assets to Tosco violates Section 7 of the Clayton Act, in that it may result in a substantial lessening of competition in the wholesale and retail motor fuel markets in California.

In reaching each of the conclusions outlined above, the Ninth Circuit engaged in judicial activism in the extreme. The appellate court in effect has turned the PMPA into an oil company Bill of Rights by applying strict construction and liberal construction as necessary in order to rule in favor of respondents Unocal and Tosco. It also overlooked, ignored, and failed to consider material elements of Petitioners' antitrust claims under the Sherman Act and Clayton Act.

A. History and Purpose of the PMPA.

The PMPA was enacted in 1978 in response to a long history of abuses in the petroleum marketing franchise relationship. In 1971, one commentator wrote:

> In the nation's second largest industry, the major oil firms have the gasoline station dealers in virtual bondage, hinged on the constant threat that their short term contracts will not be renewed unless they submit to burdensome franchisor imposed practices.
>
> * * *
>
> It is generally conceded that the gasoline station situation is almost hopeless and offers a prime example of the worst abuses in franchising.

Brown, *Franchising – A Fiduciary Relationship*, 49 Tex. L. Rev. 650, 655-57 (1971). Accordingly, the PMPA was enacted, *inter alia*, to protect "franchisees from arbitrary or discriminatory termination or non-renewal of their franchises." Senate Report No. 95-731, 95th Cong. 2d Sess. 15, *reprinted in* 1978 U.S. Code Congressional & Administrative News, 873, 874.

In *Roberts v. Amoco Oil Co.*, 740 F.2d 602, 605 (8th Cir. 1984), the Eighth Circuit observed:

> Congress enacted the PMPA after investigating and considering numerous allegations that petroleum franchisors used threats of termination or nonrenewal of the franchise to compel franchisees to comply with their marketing policies. . . . Congress intended the PMPA to address this disparity in bargaining power. [Citation omitted.]
>
> The statute seeks to protect and to effectuate the franchisee's reasonable expectations that the franchise relationship will be a continuing one.

In *Ellis v. Mobil Oil*, 969 F.2d 784 (9th Cir. 1992) the Ninth Circuit recognized that the PMPA must be given "a liberal construction consistent with its goal of protecting franchisees." *Humboldt Oil Co., Inc. v. Exxon Co., U.S.A.*, 695 F.2d 386, 389 (9th Cir. 1982); *see also Khorenian v. Union Oil Co. of Cal.*, 761 F.2d 533, 535 (9th Cir. 1985); *Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1221 (7th Cir. 1982).

Under the PMPA, the general rule is that no franchisor may terminate a franchise or fail to renew any franchise relationship, except under certain limited circumstances. 15 U.S.C. § 2802(a)(b). In this case, Unocal

seeks to justify its termination and nonrenewal of Petitioners' franchises under § 2802(b)(2)(E). This section permits the termination and/or nonrenewal of franchises where there is

> (E) . . . a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if –
>
> (i) such determination –
>
> (I) was made after the date such franchise was entered into or renewed, and
>
> (II) was based upon the occurrence of changes in relevant facts and circumstances after such date;
>
> (ii) . . . ; and
>
> (iii) in the case of leased marketing premises –
>
> (I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or
>
> (II) in the case of the sale, transfer, or assignment to another person of the

> franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

See 15 U.S.C. § 2802(b)(2)(E) (Apdx. E, pp. 57-58).

The PMPA places the burden on the withdrawing franchisor to show that each of the conditions set forth above has been met. *See, e.g., Khorenian v. Union Oil Co. of Cal.*, 761 F.2d at 536.

1. Unocal Violated the PMPA by Deciding to Withdraw From California Prior to Entering Into or Renewing Petitioners' Franchises.

Although the Ninth Circuit acknowledged in its opinion that "[f]or several years, Unocal gave consideration to various ways of restructuring the 76 Products operations, with the principal options being a spin-off of the entity, a joint venture agreement, or a sale" (Apdx. A, p. 8), it failed to appreciate the significance of this evidence.

Under the PMPA, the only way Unocal could sell or otherwise transfer Petitioners' service station premises to Tosco without giving each Petitioner the right of first refusal was by conducting a market withdrawal. 15

U.S.C. § 2802(b)(2)(E) (Apdx. E, pp. 57-58). Since there is no indication in the record that Unocal ever considered selling service station assets on an individual basis to its franchisees, Unocal's decision during 1994-95 to divest its West Coast marketing assets to another oil company necessarily was a decision to conduct a market withdrawal from California. The Ninth Circuit nonetheless affirmed the district court.

According to the Ninth Circuit, Unocal did not violate the PMPA because its decision to conduct a market withdrawal from California did not occur until its board of directors approved the transaction with Tosco on December 2, 1996. (Apdx. A, p. 17.)

This ruling is overly formalistic, wrong, and renders the PMPA toothless. Rather than being a liberal construction of the PMPA, the court's construction is the most illiberal possible. Just as it would be ludicrous to suggest that homeowners decide to sell their homes only when they sign purchase agreements, not when their homes are put on the market, it is similarly ludicrous to argue that Unocal decided to sell Petitioners' service station premises only when its board of directors formally approved the transaction with Tosco. For all practical purposes, a decision to put a group of service station premises on the market must be a decision to conduct a market withdrawal.

Inasmuch as Petitioners entered into or renewed franchise agreements with Unocal between 1994 and November 1996, there is a genuine issue of material fact as to the date on which Unocal decided to withdraw from California, and whether Unocal entered into or renewed

franchise agreements with the Petitioners after deciding to withdraw.

The Ninth Circuit's use of a bright line board of directors resolution test for establishing the timing of a decision to conduct a market withdrawal effectively writes § 2802(b)(2)(E) out of the PMPA.

2. Tosco's Franchise Offers to the Petitioners Were Discriminatory Under the PMPA.

The PMPA allows for a franchisor to terminate and/or nonrenew a franchise if it makes:

> . . . a determination . . . in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if –
>
> * * *
>
> (iii) in the case of leased marketing premises –
>
> * * *
>
> (II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are *not discriminatory* to the franchisee as compared to

> franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

15 U.S.C. § 2802(b)(2)(E) (Apdx. E, pp. 57-58) (emphasis added).

Notwithstanding the PMPA's clear requirements, Tosco offered franchises to Petitioners on terms and conditions that were discriminatory as compared with franchises then being offered by Tosco and with franchises in effect with respect to Tosco's other California franchisees. For example, Section 3 of the Tosco California lease with its franchisees that operate BP branded service stations provides that the franchisee's rent shall remain the same throughout the term of the lease. (Apdx. G, pp. 99-101.) Section 3 of the Tosco lease offered to the Petitioners, however, provides for yearly rent increases based on a formula using the Consumer Price Index. (Apdx. G, pp. 104-105.)

Inasmuch as no provision in a lease is more material than the rent, this evidence alone is sufficient to create a genuine issue of material fact with respect to whether the franchises Tosco offered to Petitioners were discriminatory under the PMPA. The Ninth Circuit disagreed.

According to the Ninth Circuit, the replacement franchise offers that Petitioners received from Tosco were not discriminatory because "they mirrored those which the franchisees had with Union Oil"; the franchise agreements upon which Petitioners' claims of discrimination are based involve franchises outside of California; and

the Petitioners failed to present evidence that Tosco's replacement franchise offers were made in bad faith. (Apdx. A, pp. 26-27.) These findings by the appellate court are irrelevant, unsupported by the record, or directly contrary to undisputed evidence.

First, the PMPA requires that the replacement franchise offers from Tosco be nondiscriminatory as compared to Tosco's existing franchise agreements, not Unocal's. Thus, any comparison between Tosco's franchise offers and the Unocal agreements under which Petitioners were operating at the time is irrelevant.

Second, the Ninth Circuit's finding that "the agreements to which [Petitioners] wish to be compared refer to franchisees in other states, who were accustomed to a different leasing regime" (Apdx. A, p. 27) is directly contradicted by undisputed evidence in the record. The Tosco/BP lease at issue clearly states "DL LEASE AND SUPPLY AGREEMENT (CALIFORNIA) TOSCO NORTHWEST COMPANY." (Apdx. G, p. 97.)

Finally, with respect to the issue of whether Tosco's replacement franchise offers were made in bad faith, according to Richard Hamlin of Tosco, after acquiring Petitioners' service stations from Unocal, Tosco held internal meetings to formulate the franchise agreements that would be offered to Petitioners. (Apdx. G, pp. 105-116.) Although Tosco's California "BP dealer" franchise agreements were discussed and reviewed during these meetings, Tosco offered different franchise agreements to Petitioners. (*Id.*) Thus, Tosco cannot claim that the different rent calculation formula in its replacement

franchise offers to Petitioners resulted from mistake or accident.

Clearly, the fact of and circumstances surrounding the different rent calculation formula in the replacement franchise offers, are sufficient to create a genuine issue of material fact as to whether Tosco's replacement offers to Petitioners were discriminatory under the PMPA.

B. The Ninth Circuit Erred in Affirming the District Court's Grant of Summary Judgment With Respect to Petitioners' Sherman Act Antitrust Claims.

1. Petitioners Have Standing to Assert Their Sherman Act Claims.

The Ninth Circuit affirmed the district court's ruling that Petitioners lacked standing to assert their Sherman Act, 15 U.S.C. § 1, claims because Petitioners had not shown actual or threatened antitrust injuries from any conduct by Unocal or Tosco. According to the Ninth Circuit:

> The suggestion that Union Oil's withdrawal from the market and sale of its marketing assets to Tosco pursuant to the provisions of the PMPA is somehow an antitrust injury because the Simmons group members did not get to engage in individual purchase transactions for their individual premises is unfounded. For example, there is not the slightest hint that Union Oil would have otherwise sold off its roughly $2,000,000,000 going concern in bits and pieces if it had not sold to Tosco, and that some benefit

> would thereby have been conferred upon the group members."

(Apdx. B, pp. 38-39.)

By focusing exclusively on Petitioners' claims that they are entitled to purchase their service station premises under the PMPA, the Ninth Circuit overlooked or ignored those aspects of Petitioners' antitrust claims that had nothing to do with whether Petitioners were entitled to purchase their station premises from Unocal.

Paragraph 67 of the first amended complaint states that the Tosco-Unocal transaction was part and in furtherance of a

> conspiracy to eliminate competition between and among themselves, divide and allocate geographic and product markets and customers in California and throughout the United States, reduce the number of service stations in the Los Angeles Basin, the State of California, and throughout the United States, fix and stabilize wholesale and retail motor fuel prices in California and throughout the United States, and deprive service station franchisees in California and throughout the United States, including the plaintiffs, of the opportunity to purchase their station premises so that those premises may continue to be controlled by the large oil companies.

In opposition to Unocal's and Tosco's motions for partial summary judgment on their antitrust claims, Petitioners submitted evidence that shortly after the November 18, 1996, public announcement of the Tosco-Unocal agreement, Unocal, Tosco, and other large oil companies operating in the state of California raised the average

price of regular unleaded gasoline in the state of California by over 10 cents per gallon. (Apdx. G, pp. 91-94.)

In analyzing whether Petitioners had standing, the Ninth Circuit completely overlooked or ignored Petitioners' claims that they were victims of a conspiracy involving Tosco, Unocal, and other oil companies to fix the wholesale prices of gasoline sold to service station dealers, and divide and allocate geographic markets and customers, in California and throughout the United States.

Nowhere in the memorandum accompanying its judgment affirming the district court's antitrust ruling did the Ninth Circuit directly or indirectly mention or address these claims that, separate and apart from whether they are entitled to purchase their station premises under the PMPA, Petitioners have been injured by having to pay wholesale motor fuel prices that were artificially high because of Unocal's and Tosco's participation in market allocation and price-fixing conspiracies. This glaring oversight led the Ninth Circuit to the absurd conclusion that Petitioners could not have suffered antitrust injury even if they had to pay higher prices for wholesale gasoline because Tosco was involved in a conspiracy to fix wholesale gasoline prices or allocate geographic markets. This holding is directly contrary to well-established rulings by this Court.

As direct purchasers from participants in a horizontal price-fixing and market allocation conspiracy (Unocal and Tosco), Petitioners here have sustained antitrust injury, and have standing to obtain relief for their injuries, both actual and threatened. The law has long been

clear, beyond question or doubt, that a direct purchaser from, or customer of, a seller engaged in a price-fixing conspiracy sustains an antitrust injury and has standing to obtain relief under the antitrust laws. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 490, n.7 (1968); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). In the first three cited cases, this Court acknowledged the right of direct customers of members of a price-fixing conspiracy to sue under the antitrust laws. In *Blue Shield of Virginia v. McCready*, the Supreme Court went a step beyond, by finding standing for a customer of a victim or direct target of an antitrust conspiracy.

Thus, the Ninth Circuit's view that Petitioners failed to demonstrate standing or antitrust injury with respect to their Sherman Act claims is contrary to controlling and applicable law, and the Court should grant this petition for a writ of certiorari.

2. Petitioners Have Standing to Assert Their Clayton Act Claims.

With respect to Petitioners' claims under Section 7 of the Clayton Act, 15 U.S.C. § 18, the Ninth Circuit stated that:

> Similarly unfounded is the claim by these franchisees that injury is threatened because the marketing of gasoline will become more concentrated. (Footnote omitted.) While some added concentration might threaten other wholesalers of gasoline, independent dealers, and consumers, there is little reason, and no evidence,

> to suggest that these franchisees are threatened by their own franchisor. We understand the desire of the group's members to escape the strictures of a franchise relationship and to sally forth on their own, but there is no indication that the frustration of that desire threatens an antitrust injury. At best, the assertion that they may be harmed is rank speculation that does not disclose a significant threat. (Citation omitted.)

(Apdx. B, p. 39.)

As with Petitioners' Sherman Act claims, the Ninth Circuit here focussed exclusively on Petitioners' claim that they were entitled to purchase their service station premises, and overlooked or ignored the claims that Tosco would be, and indeed has been, able to charge Petitioners higher wholesale motor fuel prices as a result of the anticompetitive effects of its acquisition of Unocal's assets.

Here, Petitioners stand in the position of consumers or customers of the merged entity, and, as such, have long been recognized as having standing to challenge the merger at issue under the antitrust laws. *Nelson v. Monroe Regional Medical Center ("Nelson")*, 925 F.2d 1555, 1562-64 (7th Cir. 1991); *California v. American Stores ("American Stores")*, 495 U.S. 271, 283-84 (1990). In *Nelson*, the Seventh Circuit allowed a challenge to a merger of two health care clinics brought by consumers whom the merged clinic refused to continue to treat. In finding standing for the plaintiff-consumers to challenge the merger, the court noted that "antitrust injury 'means injury from higher prices or lower output, the principal vices proscribed by the antitrust laws.' " 925 F.2d at 1564.

In *American Stores*, the State of California brought a *parens patriae* action on behalf of California consumers, and obtained injunctive relief against a merger, including divestiture, because of the potential harm threatened to California consumers. 495 U.S. at 283-84.

Thus, the Ninth Circuit's ruling that Petitioners lack standing to assert their Clayton Act, 15 U.S.C. § 18, claims was error.

CONCLUSION

Certiorari is warranted here so that this Court can (a) decide important questions of federal law that have not been, and should be, settled by this Court, and (b) reaffirm this Court's long standing precedents that direct purchasers or consumers have standing to assert antitrust claims.

On the basis of the foregoing arguments and authorities, therefore, Petitioners respectfully petition this Court for a writ of certiorari to review the questions presented herein.

Dated: September 28, 1999.

Respectfully submitted,

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INDEX TO APPENDIX

TITLE PAGE

APPENDIX A

CHARLES SIMMONS, *et al.* v. UNOCAL CORPORATION, *et al.*, Appeal No. 98-56216 and UNOCAL CORPORATION, *et al.* v. ROBERT CASSEL and MOHSEN KHAZIRI, *et al.*, Appeal No. 98-56631 (Opinion) ..... Apdx. 1

APPENDIX B

CHARLES SIMMONS, *et al.* v. UNOCAL CORPORATION, *et al.*, Appeal No. 98-56216 (Memorandum) ..... Apdx. 36

APPENDIX C

CHARLES SIMMONS, *et al.* v. UNOCAL CORPORATION, *et al.*, Appeal No. 98-56216 (Judgment) ..... Apdx. 41

APPENDIX D

CHARLES SIMMONS, *et al.* v. UNOCAL CORPORATION, *et al.*, Appeal No. 98-56216 and UNOCAL CORPORATION, *et al.* v. ROBERT CASSEL and MOHSEN KHAZIRI, *et al.*, Appeal No. 98-56631 (Order Denying Petition for Rehearing and Rejecting the Suggestion for Rehearing en Banc) ..... Apdx. 43

APPENDIX E

Sherman Antitrust Act, §§ 1, 2, 36 Stat. 209, as amended, 15 U.S.C. §§ 1, 2 (1990) ..... Apdx. 46

Clayton Antitrust Act, § 7, 38 Stat. 731, as amended, 15 U.S.C. § 18 (1996) ..... Apdx. 47

INDEX TO APPENDIX – Continued

TITLE PAGE

Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*, 92 Stat. 322, *et seq.*, as amended (1994) ..... Apdx. 50

Jurisdiction and Venue, 28 U.S.C. § 1254, 62 Stat. 928, as amended (1988)..... Apdx. 78

APPENDIX F

CHARLES SIMMONS, *et al.* v. UNOCAL CORPORATION, *et al.*, Case No. 97-1759 ABC (Judgment Granting Defendants' Motion for Summary Judgment)..... Apdx. 79

UNOCAL CORPORATION, *et al.* v. ROBERT CASSEL and MOHSEN KHAZIRI, *et al.*, Case No. 97-0161 ABC (SHx) (Judgment Granting Plaintiffs' Motion for Summary Judgment)..... Apdx. 82

APPENDIX G

October 25, 1995 Letter from Roger C. Beach, Unocal Corporation, to Dealer/Marketer .. Apdx. 86

November 18, 1996 News Release, "Unocal signs letter of intent to sell West Coast downstream assets to Tosco; deal valued at approximately $2 billion"..... Apdx. 87

San Francisco Chronicle, March 21, 1997, "Gas Prices Take Off In California" ..... Apdx. 91

July 9-10, 1996 76 Products Company Management Meeting (Excerpts only)..... Apdx. 95

DL Lease and Supply Agreement (California) Tosco Northwest Company (Excerpts only).....Apdx. 97

INDEX TO APPENDIX – Continued

TITLE PAGE

April 2, 1997 Tosco/Union 76 Dealer Station Lease and Motor Fuel Supply Agreement (Excerpts only)..... Apdx. 101

Deposition of Richard Douglas Hamlin, taken April 22, 1998, in CHARLES SIMMONS, *et al.* v. UNOCAL CORPORATION, *et al.*, Case No. 97-1759 ABC (Excerpts only)..... Apdx. 105

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNOCAL CORPORATION; UNION OIL COMPANY OF CALIFORNIA, *Plaintiffs-counter-claimants-Appellees,* v. EBRAHIM KAABIPOUR, dba, Sunnyvale Unocal & dba, Santa Clara Unocal; HASSAN KHAZIRI; HOSSAIN KHAZIRI; MOHSEN KHAZIRI; EVERGREEN UNION SERVICES, INC., DBA EVERGREEN UNOCAL; FARIBORZ NICKBAKHSH-TALI, aka, Nick; ALI RAGHIAN, dba, Al's Unocal; THUY GIA NGUYEN; LEAVESLEY RD. UNION 76 INC.; NOAH TOLLISON; TOM W. BARNUM, dba, Cuperrino Union; DAVID J. JOINES, DBA, UNOCAL AT NORTH FIRST AND BROKAW; RONALD GENE DIEDRICH; DBA, LA JOLLA TIRE AND SERVICE CENTER; MARK HORNE; VU HADOUNG, DBA, SAN MATEO UNOCAL; TINOOSH EFTEKHARIAN, DBA, SUNNYSIDE UNOCAL, *Defendants-counter-claimants-Appellants,* v. TOSCO CORPORATION, *Counter-defendant-Appellee.*	No. 97-56324 D.C. No. CV-97-00161-ABC

CHARLES SIMMONS; YOSUF HOMAYUN; SEUNG K. CHOI; DAVID AVISRUR; MEHRAN MIKE HARIRI; MEIR BEN-DAVID; FRED PAKZAD; A.H.B. PROPERTIES, INC.; MANASSEH BAREH; OMID BADAKHSH; DALLA, INC.; ASGHAR KHOLDI; STEVEN TEDESCO; AKBAR AKRAMI; S.M.B. CORPORATION; JAVAD S. TAAT; SABOUR ANDKHOY; WARM SPRINGS UNOCAL, INC.; BASIR ANDKHOY; LAWRENCE E. RAETHER; ATA TAJYAR; ALI MAJDI; SAGAHOH, INC.; MANSOR GHNEEIAN; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; SAYED HASHEMYAR; GEORGE BENJAMIN; JOHN OTTE; TOROS K. DEURDULIAN; KEVORK KASBARIAN,

Plaintiffs-Appellants,

v.

UNOCAL CORPORATION; UNION OIL COMPANY OF CALIFORNIA; 76 PRODUCTS COMPANY, INC.; TOSCO CORPORATION,

Defendants-Appellees.

No. 98-56216

D.C. No. CV-97-01759-ABC

UNOCAL CORPORATION; UNION OIL COMPANY OF CALIFORNIA,

Plaintiffs-Appellees,

v.

ROBERT CASSEL,

Defendant,

and

MOHSEN KHAZIRI; CHARLES SIMMONS; LAWRENCE E. RAETHER; MEIR BEN-DAVID; SABOUR ANDKHOY; BASIR ANDKHOY; OMID BADAKHSH; AKBAR AKRAMI; SAYED HASHEMYAR; ATA TAJYAR, STEVEN TEDESCO; MANASSEH BAREH; DAVID AVISRUR; MEHRAN MIKE HARIRI; JAVAD S. TAAT; FARHAD PAKZAD; ALI MAIDI; ASGHAR KHOLDI; SEUNG K. CHOI; MANSOOR GHANEEIAN; YOSEF HOMAYUN; S.M.B. CORPORATION; A.H.B. PROPERTIES, INC.; SAGAHOH, INC.; WARM SPRINGS UNOCAL, INC.; DALLA, INC.; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; JOHN OTTE; GEORGE BENJAMIN, *Defendants-Appellants.*	No. 98-56631 D.C. No. CV-97-00161-ABC
BASSAM D. HINDI; BEHROUZ SHIRDEL; MOHAMAD SHIRDEL; CARPINTERIA CAR CARE, INC.; CHI TAI; DANIEL LEE O'NEAL; DANIEL W. LENTZ; FAYE FOUAD; RAY FOUAD; FRANK E. JAKEL; GREGORY MESNA; GWENDOLYN MESNA; HARRY PERRY; HAYK BAZIK; HOVICK G. SADEGHI; JAVAD HAGHI; JOHN OTTE; MAURO ANTENNCEI; ONNIK NICK MATHEVOSSIAN; PAUL A. HILLES; SAID SAIDATI; SALIM JAVAHIERI; TRACY FINNEL; VAN DUONG; BRADLEY DEBOER; EMRY BROTHERS INVESTMENTS, a general partnership; DENNIS AZZARELLO; VAHANEK KUPELIAN;	No. 98-56365 D.C. No. CV-97-6388-ABC OPINION

M&K ENTERPRISES, INC., a California Corporation; STEPHEN NG; COUNTRY CLUB UNION, INC.; JOHN HIFAI; PATRICIA HILLES; SAEID SABOUR; TOMMY GENDAL,

Plaintiffs-Appellants,

v.

TOSCO CORPORATION; T NORTHWEST PROPERTIES II, INC.; CLOVER TRUST 1997-1, a DELAWARE Business Trust; UNION OIL COMPANY OF CALIFORNIA, a California corporation,

Defendants-Appellees.

Appeals from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted
April 14, 1999 – Pasadena, California

Filed May 18, 1999

Before: Dorothy W. Nelson, Ferdinand F. Fernandez, and William A. Fletcher, Circuit Judges.

Opinion by Judge Fernandez

COUNSEL

James R. Carroll and Richard L. Dooley, Law Offices of Carroll, Gilbert & Bachnor, Brea, California, for the defendants-counter-claimants-appellants in No. 97-56324.

Joseph M. Alioto, Alioto Law Firm, Daniel R. Shulman, Shulman, Walcott & Shulman, Minneapolis, Minnesota, for the plaintiffs-appellants in No. 98-56216 and for the defendants-appellants in No. 98-56631.

Kenneth P. Roberts, Kenneth, Roberts, APLC, Woodland Hills, California, for the plaintiffs-appellants in No. 98-56365.

John J. Wasilczyk and Kenneth L. Waggoner, Brobeck, Phleger & Harrison, Los Angeles, California, for plaintiffs-counter-defendants-appellees Unocal Corporation and Union Oil Company.

Gregory N. Pimstone, Latham & Watkins, Los Angeles, California, for defendants-appellees Tosco Corporation.

OPINION

FERNANDEZ, Circuit Judge:

These cases arise out of the withdrawal of Union Oil Company from the retail marketing of motor fuel in the states of Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington. In so doing, Union Oil sold all of its marketing assets to Tosco Corporation. A number of former Union Oil franchisees objected to the sale on various grounds. The district court ruled against all of them and these appeals ensued.

One group, the Kaabipour Group,[1] asserts that the district court erred when it declared that the Petroleum

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[1] This group appealed in No. 97-56324 and consists of EBRAHIM KAABIPOUR, dba, Sunnyvale Unocal & dba, Santa Clara Unocal; HASSAN KHAZIRI; HOSSAIN KHAZIRI; MOHSEN KHAZIRI; EVERGREEN UNION SERVICES, INC., dba Evergreen Unocal; FARIBORZ NICKBAKHSH-TALI, aka,

Marketing Practices Act, 15 U.S.C. §§ 2801-06, preempts California law as far as this transaction is concerned. Another group, the Simmons Group,[2] asserts that the district court erred when it decided that Union Oil and Tosco properly adhered to the provisions of the PMPA regarding withdrawal from the market, despite the Simmons Group's claims that they violated the timing, new franchise offer, and transfer of premises provisions of the PMPA. *See* 15 U.S.C. § 2802(b)(2)(E).[3] A third group, the Raether Group,[4] asserts that the district court erred when

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Nick; ALI RAGHIAN, dba, Al's Unocal; THUY GIA NGUYEN; LEAVESLEY RD. UNION 76 INC.; NOAH TOLLISON; TOM W. BARNUM, dba, Cupertino Union; DAVID J. JOINES, dba, Unocal at North First and Brokaw; RONALD GENE DIEDRICH; dba, La Jolla Tire and Service Center; MARK HORNE; VU HADOUNG, dba, San Mateo Unocal; TINOOSH EFTEKHARIAN, dba, Sunnyside Unocal.

[2] This group appealed in No. 98-56216 and consists of CHARLES SIMMONS; LAWRENCE E. RAETHER; MEIR BEN-DAVID; SABOUR ANDKHOY; BASIR ANDKHOY; OMID BADAKHSH; AKBAR AKRAMI; SAYED HASHEMYAR; ATA TAJYAR, STEVEN TEDESCO; MANASSEH BAREH; DAVID AVISRUR; MEHRAN MIKE HARIRI; JAVAD S. TAAT; FARHAD PAKZAD; ALI MAJDI; ASGHAR KHOLDI; SEUNG K. CHOI; MANSOOR GHNEEIAN; YOSEF HOMAYUN; S.M.B. CORPORATION; A.H.B. PROPERTIES, INC.; SAGAHOH, INC.; WARM SPRINGS UNOCAL, INC.; DALLA, INC.; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; JOHN OTTE; TOROS DEURDULIAN; and KEVORK KASBARIAN.

[3] The Simmons Group also raised other claims which we have addressed in an unpublished memorandum disposition.

[4] This group appealed in No. 98-56631 and consists of CHARLES SIMMONS; LAWRENCE E. RAETHER; MEIR BEN-DAVID; SABOUR ANDKHOY; BASIR ANDKHOY; OMID

it decided that Union Oil and Tosco properly adhered to the provisions of the PMPA regarding withdrawal from the market, despite the Raether Group's claims, which were the same as the Simmons Group's PMPA claims. The final group, the Hindi Group,[5] asserts that the district court erred when it decided that Union Oil and Tosco properly adhered to the PMPA regarding withdrawal from the market, despite the Hindi Group's claims that

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BADAKHSH; AKBAR AKRAMI; SAYED HASHEMYAR; ATA TAJYAR, STEVEN TEDESCO; MANASSEH BAREH; DAVID AVISRUR; MEHRAN MIKE HARIRI; JAVAD S. TAAT; FARHAD PAKZAD; ALI MAJDI; ASGHAR KHOLDI; SEUNG K. CHOI; MANSOOR GHNEEIAN; YOSEF HOMAYUN; S.M.B. CORPORATION; A.H.B. PROPERTIES, INC.; SAGAHOH, INC.; WARM SPRINGS UNOCAL, INC.; DALLA, INC.; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; JOHN OTTE; GEORGE BENJAMIN. We have adopted the designation "Raether Group" to distinguish it from the Simmons Group, from which it differs only slightly. The careful reader will see that the caption for this case refers to Khaziri, but he is not part of the Raether Group.

[5] This group appealed in No. 98-56365 and consists of BASSAM D. HINDI; BEHROUZ SHIRDEL; MOHAMAD SHIRDEL; CARPINTERIA CAR CARE, INC.; CHI TAI; DANIEL LEE O'NEAL; DANIEL W. LENTZ; FAYE FOUAD; RAY FOUAD; FRANK E. JAKEL; GREGORY MESNA; GWENDOLYN MESNA; HARRY PERRY; HAYK BAZIK; HOVICK G. SADEGHI; JAVAD HAGHI (or HEIGH); JOHN OTTE; MAURO ANTENNCEI; ONNIK NICK MATHEVOSSIAN; PAUL A. HILLES; SAID SAIDATI; SALIM JAVAHIERI; TRACY FINNEL; VAN DUONG; BRADLEY DeBOER; EMRY BROTHERS INVESTMENTS, a general partnership; DENNIS AZZARELLO; VAHANEK KUPELIAN; M&K ENTERPRISES, INC., a California Corporation; STEPHEN NG; COUNTRY CLUB UNION, INC.; JOHN HIFAI; PATRICIA HILLES; SAEID SABOUR; TOMMY GENDAL.

they violated the franchise termination and transfer provisions of the PMPA. *See* 15 U.S.C. § 2802(b)(2)(E). We affirm.

BACKGROUND

Unocal Corporation had established its wholly owned subsidiary, Union Oil, to conduct its petroleum refining, transportation, and marketing business. In 1994, Union Oil established a business unit, the 76 Products Company, to manage its refining and marketing operations, including a chain of more than 1200 service stations in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Those were operated under the terms of PMPA franchise agreements with Union Oil as the franchisor.

For several years, Unocal gave consideration to various ways of restructuring the 76 Products operations, with the principal options being a spin-off of the entity, a joint venture arrangement, or a sale. Though early negotiations during this period fell through, Unocal continued to hear expressions of interest in acquiring the 76 Products business unit from several businesses, and in September 1996 began meeting with Tosco about the possibility that Tosco would purchase 76 Products. Nevertheless, other restructuring plans continued and in October of 1996, Unocal management decided that the assets and employees of the 76 Products business unit should be transferred into a separate subsidiary. That plan was never consummated, but when it was announced, Unocal noted that it would be evaluating different options which could establish 76 Products as a

separate entity, including an IPO, a joint venture, or a sale. Any future plans depended on the ability of 76 Products to develop sufficient earnings and cash flow to stand alone.

Discussions with Tosco continued, and by late October, Tosco and Unocal were in active negotiations over 76 Products. Tosco offered to purchase the 76 Products business unit. The Union Oil board authorized a counter-offer on November 4, 1996, and a letter of intent calling for Union Oil to sell 76 Products to Tosco was signed by Tosco and Union Oil on November 17. Negotiation of specific agreements remained to be accomplished, and several conditions, including the approval of Union Oil's board, had to be met before the sale was formalized. On December 2, 1996, the Union Oil board conditionally approved the sale and purchase agreement and other agreements, and authorized Union Oil's management to enter into agreement with Tosco. The management committee of the Union Oil board authorized the signing of the sale and purchase agreement on December 13, 1996, and the sale then took place on December 14, 1996.

The assets sold included the premises of the "76" service stations, which were leased to the franchisees; Union Oil's interests in the franchise agreements with its dealers; the rights to the "76" and "Union 76" trademarks; and other assets, including refineries, pipelines, tankers, inventories, etc. The sale of 76 Products constituted a "market withdrawal" by Union Oil from the motor fuel market in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Union Oil was to terminate its franchises, but Tosco was also obliged to offer each Union Oil franchisee a nondiscriminatory, three-year

Tosco franchise. Between December 23 and 26, 1996, Union Oil sent all of its franchisees a letter notifying them of the termination and nonrenewal of their franchises, effective June 30, 1997, and also notified the Governors of the affected states of its market withdrawal.

By April 15, 1997, Tosco offered franchises, which were to become effective July 1, 1997, to the Union Oil franchisees. The new franchise contracts offered by Tosco essentially mirrored the prior contracts between Union Oil and the franchisees. However, an addendum to the Franchise Agreements noted that "[f]or off-balance sheet financing purposes," fee title to some of the franchise premises would be held by Clover Trust, which would purchase the property by taking a loan secured by a deed of trust, take fee title to it, and then lease it to T Northwest Properties II, Inc. ("Northwest"), a wholly owned subsidiary of Tosco. The franchisee's lease from Tosco was said to be "SUBJECT TO AND SUBORDINATE TO the lease with Clover Trust and deed of trust," (capitalization in original). Tosco reserved the right to terminate a franchisee's lease upon any termination or expiration of the Clover Trust lease, and Clover Trust could terminate a franchisee's lease upon any termination of the Clover Trust lease. If the Clover Trust lease were to terminate before the Franchise Agreement terminated, the addendum stated that "Tosco will exercise its option (or first right) to purchase the real property and improvements from the Clover Trust," after which the franchisees would lease their premises lease directly from Tosco, "rather than indirectly through the underlying lease" with Northwest. The Addendum further stated:

> if Tosco has determined to non-renew or terminate this Agreement, or any renewal thereof, pursuant to a provision of the Petroleum Marketing Practices Act (PMPA) which gives you the right to receive an offer to purchase the service station premises, you will receive from Tosco either a bona fide offer or a right of first refusal to purchase the marketing premises.

Clover Trust is a Special Purpose Entity created to facilitate a "synthetic leasing" arrangement used by Tosco to finance a portion of the purchase from Union Oil. Clover Trust received a loan from Sanwa Business Credit Corporation ("SBCC"), paid that money to Union Oil, took title to the properties in trust for SBCC, and then entered into a short-term lease with Tosco's subsidiary, Northwest. SBCC agrees that its role in the transaction was to facilitate the acquisitions for Tosco. Tosco has the option of acquiring the property via a fixed formula at the end of the lease. If it does not acquire the property at the end of the lease, 20 to 25 percent of the original loan will no longer be its obligation. That means that it must pay 75 to 80 percent of the loan's value even if it does not take title to the premises. Tosco intended that the transaction with Clover Trust be treated as a secured loan for tax purposes, that Tosco be entitled to all the benefits of ownership, and that "all payments of Termination Value and Fixed Rent . . . be treated as payments of principal and interest, as the case may be." Tosco and Northwest assumed all of the operational and casualty risks for the properties and all responsibility for their management, and for practical purposes has the attributes of ownership. Tosco and Northwest have all responsibility to insure and maintain the properties, must keep them free

of liens, and have the right to sublease to the franchisees. Tosco's option to purchase the properties is effectively at a definite price, so that it bears the risk of depreciation, receives the benefits of appreciation, and is responsible for compliance with environmental laws.

Once the transactions between Union Oil and Tosco were completed, including the renewal of the franchises, disputes commenced with a number of the California franchisees, many of whom asserted a desire to purchase the premises on which they were operating. Those ultimately led to these actions.

Unocal and Union Oil filed suit against the Kaabipour Group and, ultimately, the Raether Group, seeking a declaratory injunction that the withdrawal from the sale of motor fuels in California and the sale of all of the marketing assets to Tosco did not violate the PMPA. The Kaabipour Group counterclaimed for declaratory relief and injunctive relief under California Business & Professions Code § 20999.25(a), seeking a right of first refusal on the transfer of the station premises to Tosco by Union Oil. The Kaabipour Group moved for summary judgment on the counterclaim; the district court denied summary judgment and then dismissed the counterclaim, holding that § 20999.25(a) was in conflict with the PMPA and was thus preempted. The Kaabipour Group appealed. Litigation involving the Raether Group continued for several months more. Unocal, Union Oil and Tosco moved for summary judgment on March 20, 1998, and the district court granted their motion. The Raether Group then appealed.

The Simmons Group filed a separate complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged, among other things, that Union Oil violated the PMPA by entering into and renewing franchise agreements after it had decided to withdraw from the market, and by selling the Kasbarian premises to Clover Trust and SBCC, non-franchisors, without first offering Kasbarian a sale or right of first refusal. It also alleged that Tosco violated the PMPA because it failed to offer non-discriminatory franchises. The district court granted summary judgment against the Group and it appealed.

The Hindi Group also filed a separate complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged that they violated the PMPA (and Cal. Bus. & Prof. Code § 20999.25(a)) by selling the premises to Clover Trust and SBCC, non-franchisors, without first offering a sale or right of first refusal to the franchisees. The district court granted summary judgment against the Group and it, too, appealed.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review "a grant of summary judgment de novo and must determine whether the district court correctly applied the law and if, viewing the evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact." *Margolis v. Ryan*, 140 F.3d

850, 852 (9th Cir. 1998). We also review "[t]he district court's order granting [a] motion to dismiss for failure to state a claim Under Fed. R. Civ. P. 12(b)(6)" de novo. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998).

DISCUSSION

As we have already pointed out, the major issues in these matters revolve around the requirements of the PMPA. We will consider the PMPA congeries of issues in this opinion.

The PMPA was designed to offer additional protection to petroleum products franchisees because it was felt that the large oil company franchisors had excessive bargaining power and that "remedying the disparity in bargaining power between franchisors and franchisees" provided a need for the legislation. S. Rep. No. 95-731, at 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877. But that was not the only concern, for Congress also felt that what was "[n]eeded is a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non renewal of a franchise relationship." *Id.* Moreover, as Congress noted "[p]articularly important is that legislation dealing with this subject recognize the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.*

The courts of appeals have recognized these competing interests. As we, and others, have said, the "overriding purpose of Title I of the PMPA is to protect the franchisee's reasonable expectation of continuing the franchise relationship." *Ellis v. Mobil Oil*, 969 F.2d 784, 788 (9th Cir. 1992) (internal quotations and citation omitted); *see also May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 921 (6th Cir. 1989). But that does not mean that courts have ignored the other purposes. "[I]n an age of increasing corporate competition, the major firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions." *May-Som Gulf*, 869 F.2d at 921. " 'In a rapidly changing economy fixed preservation of business relationships may spell financial death to the detriment of *franchisees* as well as franchisors.' " *Id.* at 922 (citation omitted).

In so stating, we do not mean to indicate that perusal of the words of the statute should be deferred while we dig about in legislative history and the like. However, arguments which depend on the notion that the PMPA is a one-way statute, which should single-mindedly be construed to favor franchisee positions, are rooted in sterile ground. That said, it is important to set forth the words of the statute itself, as relevant here, because those form the backdrop against which the PMPA issues before us must be scrutinized. The statute provides as follows:

> [A] determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises

> are located [is a ground for termination of a franchise or non-renewal of a franchise relationship], if –
>
> (i) such determination –
>
> (I) was made after the date such franchise was entered into or renewed, and
>
> (II) was based upon the occurrence of changes in relevant facts and circumstances after such date; . . . and
>
> (iii) in the case of leased marketing premises –
>
> . . .
>
> (II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

15 U.S.C. § 2802(b)(2)(E). With that in hand, we will turn to the specific issues in this case.

A. *The Timing of The Withdrawal*

The Simmons Group and the Raether Group claim that Union Oil violated the PMPA because it decided on withdrawal before franchises were renewed with group

members and because relevant circumstances did not change after those franchises were renewed. *See* 15 U.S.C. § 2802(b)(2)(E)(i). We disagree.

In order to meet the terms of 15 U.S.C. § 2802(b)(2)(E)(i)(I), Union Oil's decision to withdraw from the market must have been made after the date that the franchisees' franchises were entered into or renewed. The latest franchise renewal was October 1, 1996. The district court ruled that the withdrawal determination had been made on December 2, 1996, when Unocal's board approved a resolution authorizing Union Oil to enter into an agreement with Tosco. We agree. Thus, Union Oil met the requirements of § 2802(b)(2)(E)(i)(I).

Generally, the approval of the franchisor's Board of Directors constitutes the legally effective date of a decision for PMPA purposes. *See May-Som Gulf*, 869 F.2d at 919, 927 (holding that date franchisor's Board of Directors conditionally accepted buyer's bid was date market withdrawal decision was made); *Anderson v. Chevron Corp.*, 933 F.Supp. 52, 59 (D.D.C.1996) (holding that "the day when the Board of Directors of defendant Chevron [the outgoing franchisor] tentatively approved the proposed exchange of assets with Exxon [the incoming franchisor], and instructed [its officers] to negotiate [and] execute a final exchange agreement" was date of market withdrawal decision). As the district court noted, the logic of these cases is compelling. Weighing options is not the same as making a decision, and, absent evidence to the contrary, a corporation is not bound until its board acts. As the franchisees' own references to the evidence in the record indicate, years of considerations, negotiations, and false starts had preceded the eventual deal with Tosco,

and this, contrary to the franchisees' reasoning, suggests that courts should be wary about finding a fixed determination to withdraw at any point prior to the board's authoritative decision. Because none of the franchises was entered into or renewed after the decision to withdraw was made, the PMPA was not violated in this respect.

By the same token, the relevant facts and circumstances clearly changed after October 1, 1996, because only after that was a sale to Tosco negotiated and an even semisolid decision to withdraw reached. Therefore, 15 U.S.C. § 2802(b)(2)(E)(i)(II) was not violated either. *See May-Som Gulf*, 869 F.2d at 926 ("the presence of a willing and acceptable buyer is a fundamental change in market conditions").

B. *The Transfer of The Premises; The Synthetic Lease*

The Simmons Group, the Raether Group and the Hindi Group all claim that Union Oil violated the PMPA because the premises of one or more members of their groups were not transferred to Tosco itself, but were transferred to the Clover Trust. *See* 15 U.S.C. § 2802(b)(2)(E)(iii)(II). The claim of the Raether Group can be rejected at once because none of its members held premises which were transferred to the Clover Trust. The other two groups are a different matter, and their claims must be resolved on the merits, but we are satisfied that the district court did not err.

When a franchisor terminates or nonrenews existing franchises or franchise relationships[6] as part of a market withdrawal, § 2802(b)(2)(E)(iii) provides that the franchisor can either (I) grant the franchisee a chance to match a bona fide offer to purchase the premises or (II) sell, assign, or transfer the franchisor's interest in the premises to another person who will offer a nondiscriminatory franchise to the franchisee. Subsection II requires that the old and new franchisors act in a manner consistent with "the overriding purpose of . . . the PMPA . . . to protect the franchisee's reasonable expectation of continuing the franchise relationship." *See Ellis*, 969 F.2d at 788. The franchisees argue that the terms of subsection II have not been met, nor can they be, because Clover Trust, the holder of title to the premises, is not a

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[6] The term "franchise" includes "the contracts or agreements that provide for the franchisee's use of a franchisor's trademark, the lease of a service station, and the motor fuel supply contract." *Han v. Mobil Oil Corp.*, 73 F.3d 872, 876 (9th Cir. 1995); 15 U.S.C. § 2801(1). "The 'franchise relationship' is comprised of the respective obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise." *Han*, 73 F.3d at 876; 15 U.S.C. § 2801(2). The "franchise relationship" is "an entity separate from, but defined by, the 'franchise,' or contractual arrangement existing between the parties." *Han*, 73 F.3d at 876. The term "franchise relationship" reaches situations where the franchise contract may no longer exist. "The 'franchise relationship' term assures that the parties understand that even though the contract is no longer in effect, the PMPA still will protect a viable relationship between the parties." *Id.* at 876 n. 3.

franchisor[7] capable of offering nondiscriminatory franchises to the former Union Oil franchisees. That argument is far too simplistic.

All agree that Clover Trust is not a franchisor, and cannot authorize anyone to use a trademark in connection with fuel sales. It has not even entered into any contractual relationship with the franchisees. That, however, does not mean that the requirements of subsection II have not been met, and that subsection I should have been applied. As Union Oil and Tosco point out, the synthetic lease arrangement involving Clover Trust should not be considered a violation of subsection II, because Clover Trust is part of a special purpose financing arrangement whereby Tosco, in effect, purchased the property, and Tosco was capable of offering nondiscriminatory franchises to the former Union Oil franchisees.

Nothing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom the franchisor's interest in the premises is transferred from financing the purchase and securing that

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[7] The PMPA defines "franchisor" as "a refiner or distributor . . . who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel." 15 U.S.C. § 2801(3). A "franchise" is a contract "under which a refiner or distributor . . . authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use." 15 U.S.C. § 2801(1)(A).

financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements. It is true that the terms of the PMPA are to be liberally construed to protect the franchisees. *See Humboldt Oil Co., Inc. v. Exxon Co.*, 695 F.2d 386, 389 (9th Cir. 1982). On the other hand, the use of secured financing can facilitate large transactions like the one at hand, without adding any untoward instability to franchise arrangements. In that regard, as we have already noted, in enacting the PMPA Congress did not wish to unduly interfere with the interests of the franchisor, who is, after all, the owner of the property involved. *See May-Som Gulf*, 869 F.2d at 921; *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391-92 (9th Cir. 1986). Union Oil had an interest in capitalizing on the investments it had made in the corporate identity and goodwill of 76 Products, and it could fully recover that investment if it could sell a going concern, including trademarks, franchise operations, and service station premises. If, as appears here, the particular details of the financing of the sale transaction had no untoward impact on the interests of the franchisees, there is no reason to find a PMPA violation.

The PMPA does not contain any internal definition of ownership, although it is rather expansive in its definition of "leased marketing premises," which it defines as premises "owned, leased, or in any way controlled by the franchisor." 15 U.S.C. § 2801(9); *see also Fresher v. Shell Oil Co.*, 846 F.2d 45, 46-47 (9th Cir. 1988). Tosco's control of the premises was always quite real. Indeed, general law treats synthetic lease arrangements as transparent for tax

and other purposes.[8] The entire point of a synthetic lease is that it is treated as an operating lease for accounting purposes, but is otherwise regarded by virtually all concerned, including the government, as a secured loan.

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[8] We refer, of course, to a transaction which is structured as the financing device often called a synthetic lease. *See* John C. Murray, *Off-Balance-Sheet Financing: Synthetic Leases*, 32 Real Prop. Prob. & Tr. J. 193, 195-200 (1997); Andrew Ratner, *Synthetic Leasing: Too Good to be Ignored; Real Estate Financing*, National Real Estate Investor, August 1996, at 104. While the arrangement *is* treated as an operating lease for accounting purposes under Generally Accepted Accounting Principles, a synthetic lease is viewed as a secured loan by the IRS for tax purposes. *See Murray, supra* at 196-97; *Ratner, supra* at 104; *cf.* Tech. Adv. Mem. 98-02-002 (Jan. 9, 1998); Rev. Proc. 75-21, 1975-1 C.B. 715; Rev. Proc. 75-28, 1975-1 C.B. 752; Rev. Proc. 76-30, 1976-2 C.B. 647. It is treated as a security instrument for both UCC and real property financing purposes. *See* William D. Egler, *Financing Structures: A Primer of Synthetic Lease Transactions*, Equipment Leasing, June 1997, at 5. And, in the area of bankruptcy, courts have also looked through other kinds of lease arrangements to the underlying "federal law purposes" and "economic realities" of those arrangements. *See Moreggia & Sons, Inc. v. Walsh (In re Moreggia & Sons, Inc.)*, 852 F.2d 1179, 1182 (9th Cir. 1988) (applying 11 U.S.C. § 365); *see also Liona Corp. N.V. v. PCH Assocs. (In re PCH Assocs.)*, 804 F.2d 193, 201 (2d Cir. 1986) (though transaction was labeled a sale and leaseback, its true nature was that of a joint venture and therefore no landlord-tenant relationship existed under § 365); *In re Independence Village*, 52 B.R. 715, 718-20 (Bankr. E.D.Mich.1985) (the intentions of the parties to the transaction and the economic substance of the transaction, rather than who holds legal title, determinative under § 365); *see also Murray, supra* at 204-208, 217-222 (bankruptcy issues discussed, treatment not entirely clear). There is no contention that the transaction here was not a synthetic lease. Of course, some care is needed in the use of the phrase, for it is the structure, not the phrase, that is important.

Despite the fact that a synthetic lease arrangement could formalistically be parsed into individual arrangements which would include a purchase by Clover Trust for the benefit of SBCC with a lease to Tosco, we need not, and do not, ignore the fact that the cumulative arrangements resulted in a single transaction whereby Tosco took over the ownership role formerly held by Union Oil. *See Sun Oil Co. v. C.I.R.*, 562 F.2d 258, 268-69 (3d Cir. 1977). In other words, there is no reason to hold that an arrangement which is seen as a transparent financing arrangement with true ownership in a Tosco entity for other legal purposes should become opaque when we look at it through a PMPA lens.

In addition, to allay any franchisee concerns, Tosco included in the Addendum to the franchise agreement a statement that it will purchase the property from Clover Trust if the lease ends before the termination of the franchise agreement. The Addendum also guarantees the franchisees a right of first refusal pursuant to the terms of the PMPA in case of non-renewal or termination. Thus, Tosco is contractually bound in its franchise agreement to protect the franchisees' expectations of an ongoing franchise relationship. That, again, underscores Tosco's understanding that in reality its obligations and rights are the same as they would be under a more conventional mortgage. Tosco could breach its contract, default, and lose the property. But the PMPA does not require us to assume that it will, and it is more reasonable to assume, instead, that "[t]hings happen according to the ordinary course of nature and the ordinary habits of life." Cal. Civ. Code § 3546. Barring financial collapse, it is highly unlikely that Tosco will forego its option to purchase at

the end of the synthetic lease term because the effective financial penalties would be very steep. From Tosco's standpoint, its acquisition of fee title is, as it puts it, "a forgone conclusion."

Moreover, the franchisees have not shown any interests put at risk by the method used to sell the premises to Tosco. They are operating under the same franchise terms, and their reasonable expectations of a continuing franchise relationship have not been thwarted by the use of the synthetic lease. The franchisees are all exactly where they reasonably could have expected to be under the franchise agreements they made as retailers of 76 Products had a more conventional financing arrangement been used. Life goes on as before, and they are receiving precisely the benefit of the franchise relationship that they bargained for.

The synthetic lease should, therefore, be treated as the financing vehicle it is, and for PMPA purposes Tosco should be looked upon as the transferee. Subsection II was not violated by its use.

C. *The Franchise Offers*

The Simmons Group and the Raether Group claim that Union Oil violated the PMPA because Tosco did not make a nondiscriminatory offer of new franchises to them. *See* 15 U.S.C. § 2802(b)(2)(E)(iii)(II). Again, we disagree.

Section 2802(b)(2)(E)(iii)(II) allows a franchisor making a market withdrawal to sell, assign, or transfer the premises and the franchise to another franchisor who will

offer a nondiscriminatory franchise to the franchisee. Again, subsection II requires the old and new franchisors to act in a manner consistent with "the overriding purpose of . . . the PMPA . . . to protect the franchisee's reasonable expectation of continuing the franchise relationship." *See Ellis*, 969 F.2d at 788.

Pursuant to the requirements of the PMPA, a franchisor may sell its franchise to another franchisor so long as the purchasing party "offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor." § 2802(b)(2)(E)(iii)(II). The terms of a franchisee's new franchise agreement need not be identical to those of every other franchise agreement; "[a] franchisor must be free to offer different terms at different franchise locations." *Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1438 (10th Cir. 1987). "The PMPA . . . only requires that the franchise terms be similar, i.e., not discriminatory, to other franchises currently in effect or currently being offered by the purchasing franchisor." *Southern Nevada Shell Dealers Ass'n v. Shell Oil Co.*, 725 F.Supp. 1104, 1109 (D.Nev. 1989); *see also Avramidis v. Arco Petroleum Prods. Co.*, 798 F.2d 12, 13-14 (1st Cir. 1986).

The "good faith" requirement looks to whether the franchisor's actions are designed to "conceal selective discrimination against individual franchises," *Southern Nevada Shell Dealers*, 725 F.Supp. at 1109, but "avoid[s] judicial scrutiny of the business judgment itself." *Id., citing Siecko v. Amerada Hess Corp.*, 569 F.Supp. 768, 772 (E.D.Pa. 1983). In the context of grounds for nonrenewal

under § 2802(b)(3)(A) of the PMPA, courts have similarly sought to inquire into "good faith" without engaging in "judicial second-guessing of 'the economic impact of an otherwise legitimate business decision by the franchisor. So long as the franchisor does not have a discriminatory motive or use the altered terms as a pretext to avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith.' " *Valentine*, 789 F.2d at 1392 (citation omitted).

Neither Group disputes that the franchise agreements offered by Tosco were essentially the same for each of their members, or that they mirrored those which the franchisees had with Union Oil. They claim, however, that the PMPA requires that the franchises Tosco offered to the former Union Oil franchisees be compared to the "franchises . . . in effect and with respect to which [Tosco] is the franchisor," which means, they argue, that the new "76" franchise agreements must be compared to Tosco's existing franchise agreements. Specifically these California franchisees seek to be compared with Tosco's BP franchisees, all of whom are outside of California. The district court did not resolve the comparison issue, but concluded that, even if the "76" franchise agreements were compared to the BP agreements, the differences between them would not amount to discrimination against the "76" franchisees. We agree with that approach and limit our consideration accordingly.

The sole salient difference between the franchise agreements that the franchisees address in this appeal is the provision for a yearly increase in rent in the "76" agreements, while the BP agreements have a fixed rent

throughout the lease term. The franchisees offer no evidence of discriminatory motive in this difference, pointing only to the fact that Tosco reviewed its BP franchise agreements when deciding what agreements to offer its new "76" franchisees. They portentously observe that this means the different rent provisions cannot be dismissed as a mistake or accident, and assert that "[t]his is compelling evidence of bad faith." Of course, the mere fact that a decision was intentional does not evidence bad faith. All the more so here, where what Tosco decided to do was offer its new franchisees precisely the agreement terms they were accustomed to, rather than alter them. Indeed, it is hard to see how use of the "76" franchise terms, which the franchisees had been living with for years, became evidence of bad faith when offered by Tosco, the new owner of 76 Products. The mere fact that the amount of rent might differ from one place to another does not show discrimination. *See Southern Nevada Shell Dealers*, 725 F.Supp. at 1109. Especially is that true where, as here, the complaining group members are all located in California, whereas the agreements to which they wish to be compared refer to franchisees in other states, who were accustomed to a different leasing regime.

Because the franchisees have not demonstrated any lack of good faith in Tosco's offer of franchises to them, and cannot show that they have been treated in a discriminatory fashion, the district court did not err.

D. *Preemption of California Law*

The Kaabipour Group asserts that California law applies to this market withdrawal and, as a result, Union

Oil was required to offer its members the right to purchase their premises before they were transferred to Tosco. *See* Cal. Bus. & Prof. Code § 20999.25(a).[9] In a related claim, the Hindi Group asserts that because its members' franchises did not terminate at the exact time that the transfer to Tosco became effective, California law applies. The district court held that California law was preempted to the extent that it attempted to add terms and conditions to the market withdrawal by Union Oil beyond those required by the PMPA itself. We agree with the result reached by district court.

"In enacting the PMPA, Congress attempted to provide national uniformity of petroleum franchise termination law." *Atlantic Richfield Co. v. Herbert (In re Herbert)*, 806 F.2d 889, 892 (9th Cir. 1986). That uniformity "would be frustrated" if the PMPA did not preempt "all inconsistent state law." *Id.* Section 2806(a) of Title 15 provides for preemption of all state law with respect to termination of

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[9] The section reads:

> In the case of leased marketing premises as to which the franchisor owns a fee interest, the franchisor shall not sell, transfer, or assign to another person the franchisor's interest in the premises unless the franchisor has first either made a bona fide offer to sell, transfer, or assign to the franchisee the franchisor's interest in the premises, other than signs displaying the franchisor's insignia and any other trademarked, servicemarked, copyrighted or patented items of the franchisor, or if applicable, offered to the franchisee a right of first refusal of any bona fide offer acceptable to the franchisor made by another to purchase the franchisor's interest in the premises.

a petroleum franchise which is inconsistent with the PMPA.

The preemptive scope of the PMPA *is* limited; it does not reach any state laws which only incidentally affect franchise termination or nonrenewal. *See Pride v. Exxon Corp.*, 911 F.2d 251, 257-58 (9th Cir. 1990) (finding that state law regarding fraud in the formation of contracts was not preempted by the PMPA because it did "not implicate the grounds for, procedures for or notification requirements of termination and nonrenewal under the [PMPA]"); *see also Esso Standard Oil Co. v. Dept. of Consumer Affairs*, 793 F.2d 431, 434 (1st Cir. 1986) (restrictive view of PMPA preemption); *Bellmore v. Mobil Oil Corp.*, 783 F.2d 300, 304 (2d Cir. 1986) (same); *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 592-93 (3d Cir. 1989) (same); *Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907, 915 (6th Cir. 1986) (same). *But see Jimenez*, 853 F.2d at 272-74 (expansive view of PMPA preemption, rejecting *Bellmore*); *Continental Enters., Inc. v. American Oil Co.*, 808 F.2d 24, 27-28 (8th Cir. 1986) (same, rejecting Esso Standard Oil Co.). *See also* Theresa L. Kruk, Annotation, *Pre-emptive Scope of § 106(a) of Petroleum Marketing Practices Act (15 U.S.C.A. § 2806(a))*, 103 ALR Fed. 698, 704-05 (1991). On its face, however, that offers little succor to these groups because this clearly was a market withdrawal by Union Oil and a termination of the franchises.

California Business & Professions Code § 20999.25(a) "was prompted by a concern that major oil companies were reducing the number of independently-operated service stations in California." *Forty-Niner Truck Plaza, Inc. v. Union Oil Co.*, 58 Cal.App.4th 1261, 1272, 68 Cal.Rptr.2d 532, 537 (1997). It parallels the PMPA in

"seek[ing] to protect the franchisee's reasonable expectation of continuing its business while allowing the franchisor adequate flexibility to respond to changing market conditions." *Id.* at 1273, 68 Cal.Rptr.2d at 538.

While § 20999.25 parallels the PMPA, it does not invade the PMPA sphere. In *Forty-Niner*, the court said, "[T]he PMPA covers franchise termination and nonrenewal while section 20999.25(a)'s scope encompasses a situation where the franchisor is going to sell the service station premises but will assign rather than end the franchise arrangement." *Id.* at 1276-77, 68 Cal.Rptr. at 540. It noted that "[t]he sponsor of [section 20999.25(a)], . . . states that the bill is intended to address circumstances not covered under the [PMPA]." *Id.* at 1275, 68 Cal.Rptr.2d at 539 (internal quotation marks and citations omitted). It concluded that "[s]ection 20999.25(a) is not designed to cover franchise termination or nonrenewal in a way different than the PMPA," and "must be construed to be the same as the PMPA with respect to franchise termination or nonrenewal." *Id.* and n.6.

The franchisor in *Forty-Niner*, which was also Union Oil, had sold truck stop properties it had leased to franchisees to a third party, but had assigned the franchise agreements to that third party rather than terminate or nonrenew them. Because there was no termination or nonrenewal, the PMPA was not implicated. The court concluded that "[t]he PMPA and section 20999.25(a) occupy different spheres." *Id.* at 1276, 68 Cal.Rptr.2d at 539-40. "[S]ection 20999.25(a) facilitates the purchase of

the service station by the franchisee leasing and operating it (*outside the PMPA context of termination or nonrenewal*)."[10] *Id.* at 1274, 68 Cal.Rptr.2d at 538 (emphasis added). Thus, it fills gaps not covered by the PMPA. *See, e.g., Patel v. Sun Co., Inc.*, 866 F.Supp. 871, 873 (E.D.Pa. 1994) (where franchise rights were not sold, assigned, or otherwise affected, despite sale of premises, the franchisees' requests for injunctive relief and damages under the PMPA were denied, because the PMPA is not addressed to situations not involving termination or nonrenewal), *aff'd on other grounds*, 63 F.3d 248 (3d Cir. 1995). In other words, the statutes are not really in conflict, and the PMPA controls in a termination or nonrenewal case.

We much prefer that reading of the statutes. It accords with the respectful approach of generally interpreting and applying legislation by harmonizing state and federal statutes where possible so as to avoid finding preemption. *See California ARCO Distribs., Inc. v. Atlantic Richfield Co.*, 158 Cal.App.3d 349, 359, 204 Cal.Rptr. 743, 750 (1984) ("State and federal laws should be accommodated and harmonized where possible so that preemption can be avoided."); *see also Committee of Dental Amalgam*

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[10] The court repeated this point in holding that the section was not an unconstitutional taking of the property right to sell a right of first refusal. The court held that "section 20999.25(a) substantially advances a legitimate state interest" because "[i]t facilitates the purchase of retail service stations by their independent lessee-franchisees *in contexts outside franchise termination and nonrenewal*, thereby ensuring the motoring public greater access to service stations and furthering a more dynamic and full-service oriented (tires, batteries, tune-ups, etc.) retailing atmosphere." *Forty-Niner*, 58 Cal.App.4th at 1273, 68 Cal.Rptr.2d at 538 (emphasis added).

Mfrs. and Distribs. v. Stratton, 92 F.3d 807, 811 (9th Cir. 1996) (strong presumption against finding that state law is preempted by federal law).[11]

In this case, Union Oil was expressly engineering a market withdrawal involving the termination of franchise agreements, and was selling its franchise business and the premises. Thus, because the federal and state provisions "occupy different spheres," *Forty-Niner*, 58 Cal.App.4th at 1276, 68 Cal.Rptr.2d at 539-40, and this case is *within* the context of franchise termination or nonrenewal, the federal provision controls.

The Hindi Group attempts to avoid this result by asserting that California law applies because this really was not a nonrenewal or termination situation. Considering the fact that Union Oil did give notice of both nonrenewal and termination, together with the fact that Tosco did offer a new franchise agreement, that is a rather surprising argument. Like other group arguments in this case, it is based on a transaction technicality.

Union Oil notified the franchisees on December 26, 1996, that their franchises would be nonrenewed or terminated effective June 30, 1997. In the meantime, the sale

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[11] Were it necessary to find a clash between § 20999.25 and the PMPA, we have little doubt that the terms of the PMPA must prevail when, as here, the franchises are being nonrenewed and terminated. *See Pride*, 911 F.2d at 258; *Humboldt Oil*, 823 F.2d at 374; *In re Herbert*, 806 F.2d at 892; *see also Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995); *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Again, however, we need not decide that question here.

to Tosco closed March 31, 1997, and Tosco offered new franchise agreements, which were to be effective July 1, 1997. During the period from March 1, 1997 to July 1, 1997, the franchisees were operating under their old franchise agreements. Thus, the Hindi Group argues, there was no PMPA termination at all.

The argument is not without a degree of elegance, but it is a grasp at a straw. The PMPA does not state that in a complex transfer situation everything must happen on one day. It merely provides that a franchisor may terminate or fail to renew a franchise, if it is withdrawing from the market, transfers the premises to a new franchisor, and the new franchisor makes a proper offer of a new franchise. *See* 15 U.S.C. § 2802(b)(2)(E)(iii)(II). That is precisely what occurred here.

As Tosco points out, it had to own the property before it could offer new franchises at those sites, which would not be subject to contingencies inherent in closing the sale. The approach used also gave the franchisees enough time to consider the new franchise agreements. Nothing argued by the franchisees suggests any defect in those considerations. Moreover, Tosco asserts, "[t]his timing mechanism is a procedure generally utilized in market withdrawals where a new franchise will be offered to the franchisees by the purchasing franchisor." That assertion appears plausible, and is not refuted by the franchisees. We accept it.

The PMPA neither states nor implies that a complex transaction should be evaluated by parsing it moment by moment into each discrete component, rather than considering it as a single transaction. To so parse it would be

particularly undesirable where, as here, the arrangement is consistent with the PMPA's purpose of stabilizing continuing franchise relationships, rather than causing discontinuities in the motor fuel marketing area. The Hindi Group's argument implies that if land is transferred a day before the franchise ends, state law applies, and if it transfers the day after the franchise ends, the PMPA is violated. Neither of those implications holds water. Rather, Union Oil and Tosco did comply with both the letter and the spirit of the PMPA when the former chose to withdraw from the market. The straw will not keep this claim afloat.

CONCLUSION

The various groups of franchisees who have appealed these cases seem to look upon the PMPA as if it were merely a rigid mathematical formula, which must be followed with precision if the correct answer is to be obtained. It is not. In fact, in enacting the PMPA Congress used language which is quite fluid. While the substance of the provisions must be followed, no particular set of facts constitutes the sole means of meeting those substantive requirements. Recognizing that, we hold that the substance of the requirement that the franchisor's interest in the marketing premises be transferred to a person who will offer a new franchise to the franchisee is simply that both the franchise and the interest in the premises come under the control of the new franchiser – here Tosco. An allotrope of that substance would be the rather traditional purchase with financing secured by the transferred property. The synthetic lease method used here is simply another allotrope. In short, the PMPA was complied with

because the substance remained the same. Similarly, the substance of the PMPA was followed when Tosco offered the new franchises to the old Union Oil franchisees. Moreover, Union Oil did not violate the PMPA's timing provisions in any respect, and California law did not apply to this market withdrawal.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES SIMMONS; YOSUF HOMAYUN; SEUNG K. CHOI; DAVID AVISRUR; MEHRAN MIKE HARIRI; MEIR BEN-DAVID; FRED PAKZAD; A.H.B. PROPERTIES, INC.; MANASSEH BAREH; OMID BADAKHSH; DALLA, INC.; ASGHAR KHOLDI; STEVEN TEDESCO; AKBAR AKRAMI; S.M.B. CORPORATION; JAVAD S. TAAT; SABOUR ANDKHOY; WARM SPRINGS UNOCAL, INC.; BASIR ANDKHOY; LAWRENCE E. RAETHER; ATA TAJYAR; ALI MAJDI; SAGAHOH, INC.; MANSOR GHNEEIAN; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; SAYED HASHEMYAR; GEORGE BENJAMIN; JOHN OTTE; TOROS K. DEURDULIAN; KEVORK KASBARIAN, Plaintiffs-Appellants, v. UNOCAL CORPORATION; UNION OIL COMPANY OF CALIFORNIA; 76 PRODUCTS COMPANY, INC.; TOSCO CORPORATION, Defendants-Appellees.	) No. 98-56216)) D.C. No.) CV-97-01759-ABC)) **MEMORANDUM**[1])) (Filed) May 18, 1999)

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted April 14, 1999
Pasadena, California

Before: D.W. NELSON, FERNANDEZ, and
W. FLETCHER, Circuit Judges.

This case arises out of the withdrawal of Union Oil Company from the retail marketing of motor fuel in the states of Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington. In so doing, Union Oil sold all of its marketing assets to Tosco Corporation. A number of former Union Oil franchisees (the Simmons Group) objected to the sale on various grounds and brought this action. The district court ruled against them, they appealed, and we affirm.[2]

The Simmons Group asserts that the transfer to Tosco violated the antitrust laws, and that its members were deprived of discovery to which they were entitled. We do not agree.

(1) Antitrust Claims

The Simmons Group asserts that the transfer of the Union 76 franchise interests and premises to Tosco was an antitrust violation under section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits combinations in restraint of trade, and section 7 of the Clayton Act, 15 U.S.C. § 18,

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[2] In this disposition we address certain of the claims of the Simmons Group. The remainder of the claims are disposed of in a published opinion filed at or before the filing of this disposition.

which prohibits acquisitions that may lessen competition. Thus, it sought relief pursuant to both section 4 of the Clayton Act, 15 U.S.C. § 15, damages, and section 16 of that Act, 15 U.S.C. § 26, injunctive relief. Of course, the former requires proof of loss and any damage proven is trebled, while the latter only requires a threat of loss and does not provide for trebling. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-111, 112 S. Ct. 484, 488-90, 93 L. Ed. 2d 427 (1986). But, an antitrust plaintiff must demonstrate that the injury in question is "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977). If relief is sought under section 4, the plaintiff must demonstrate standing, which is tested by the application of a number of factors, which seek to assure, among other things, that the asserted damage is not a matter of mere speculation as far as the plaintiff is concerned, and that, even if there were some damage, the plaintiff is truly an appropriate person to assert it for antitrust purposes. *See Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538, 103 S. Ct. 897, 908, 74 L. Ed. 2d 723 (1983); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc). Section 16 is not quite as demanding, but it at least requires a showing that there is a significant threat impending. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969).

We agree with the district court that on the record before us the Simmons Group has not sustained those showings. The suggestion that Union Oil's withdrawal from the market and sale of its marketing assets to Tosco

pursuant to the provisions of the PMPA is somehow an antitrust injury because the Simmons Group members did not get to engage in individual purchase transactions for their individual premises is unfounded. For example, there is not the slightest hint that Union Oil would have otherwise sold off its roughly $2,000,000,000 going concern in bits and pieces if it had not sold to Tosco, and that some benefit would thereby have been conferred upon the group members.

Similarly unfounded is the claim by these franchisees that injury is threatened because the marketing of gasoline will become more concentrated.[3] While some added concentration might threaten other wholesalers of gasoline, independent dealers, and consumers, there is little reason, and no evidence, to suggest that these franchisees are threatened by their own franchisor. We understand the desire of the group's members to escape the strictures of a franchise relationship and to sally forth on their own, but there is no indication that the frustration of that desire threatens an antitrust injury. At best, the assertion that they may be harmed is rank speculation which does not disclose a significant threat. *See, e.g. Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 582-87, 590-91, 592-95 (3d Cir. 1979). Indeed, one might as easily note that franchisees are actually allies of their franchisor as all of them face the marketing efforts of others. *Cf. Hospital Corp. of America v. F.T.C.*, 807 F.2d 1381, 1387 (7th Cir. 1986).

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[3] As it is, even after the Union Oil purchase, Tosco had a smaller share of the market than other major players.

Perhaps someday Tosco will turn on the Simmons Group members and injure or threaten to injure them. Perhaps that injury or threat will be of the type that implicates the antitrust laws. For now, however, they have not spelled out antitrust standing. The district court did not err.

(2) Discovery Claim

The claim of the Simmons Group regarding discovery errors by the district court is meritless as far as appellate consideration is concerned. The group did first seek to depose the chairmen of Unocal and Tosco, and the district court did grant a protective order at that time. But the group waited until very late in the flow of this case at the district court before it attempted to refresh its deposition motion. A grant of its request at that point would have pushed discovery beyond the cutoff date. The district court was satisfied that the group had been "extremely dilatory," and that it should not be permitted to proceed with discovery at that time. We understand the group's argument to the contrary, but we cannot say that the district court abused its discretion when it saw things differently. *See Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998); *Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc.*, 62 F.3d 1217, 1219 (9th Cir. 1995).

AFFIRMED.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-56216
CT/AG#: CV-97-01759-ABC (SHx)

CHARLES SIMMONS; YOSUF HOMAYUN; SEUNG K. CHOI; DAVID AVISRUR; MEHRAN MIKE HARIRI; MEIR BEN-DAVID; FRED PAKZAD; A.H.B. PROPERTIES, INC.; MANASSEH BAREH; OMID BADAKHSH; DALLA, INC.; ASGHAR KHOLDI; STEVEN TEDESCO; AKBAR AKRAMI; S.M.B. CORPORATION; JAVAD S. TAAT; SABOUR ANDKHOY; WARM SPRINGS UNOCAL, INC.; BASIR ANDKHOY; LAWRENCE E. RAETHER; ATA TAJYAR; ALI MAJDI; SAGAHOH, INC.; MANSOR GHNEEIAN; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; SAYED HASHEMYAR; GEORGE BENJAMIN; JOHN OTTE; TOROS K. DEURDULIAN; KEVORK KASBARIAN

Plaintiffs - Appellants

v.

UNOCAL CORPORATION; UNION OIL COMPANY OF CALIFORNIA; 76 PRODUCTS COMPANY, INC.; TOSCO CORPORATION

Defendants - Appellees

(Filed Jul. 9, 1999)

(Entered Jul. 15, 1999)

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED with costs.

Filed and entered MAY 18, 1999

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES SIMMONS; YOSUF HOMAYUN; SEUNG K. CHOI; DAVID AVISRUR; MEHRAN MIKE HARIRI; MEIR BEN-DAVID; FRED PAKZAD; A.H.B. PROPERTIES, INC.; MANASSEH BAREH; OMID BADAKHSH; DALLA, INC.; ASGHAR KHOLDI; STEVEN TEDESCO; AKBAR AKRAMI; S.M.B. CORPORATION; JAVAD S. TAAT; SABOUR ANDKHOY; WARM SPRINGS UNOCAL, INC.; BASIR ANDKHOY; LAWRENCE E. RAETHER; ATA TAJYAR; ALI MAJDI; SAGAHOH, INC.; MANSOR GHNEEIAN; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; SAYED HASHEMYAR; GEORGE BENJAMIN; JOHN OTTE; TOROS K. DEURDULIAN; KEVORK KASBARIAN, Plaintiffs - Appellants, v. UNOCAL CORPORATION; UNION OIL COMPANY OF	No. 98-56216 D.C. No. CV-97-01759-ABC ORDER DENYING PETITION FOR REHEARING AND REJECTING THE SUGGESTION FOR REHEARING EN BANC (Filed Jun. 30, 1999)

CALIFORNIA; 76 PRODUCTS COMPANY, INC.; TOSCO CORPORATION,

Defendants - Appellees.

UNOCAL CORPORATION; UNION OIL COMPANY OF CALIFORNIA,

Plaintiffs - Appellees,

v.

ROBERT CASSEL,

Defendant,

and

MOHSEN KHAZIRI; CHARLES SIMMONS; LAWRENCE E. RAETHER; MEIR BEN-DAVID; SABOUR ANDKHOY; BASIR ANDKHOY; OMID BADAKHSH; AKBAR AKRAMI; SAYED HASHEMYAR; ATA TAJYAR, STEVEN TEDESCO; MANASSEH BAREH; DAVID AVISRUR; MEHRAN MIKE HARIRI; JAVAD S. TAAT; FARHAD PAKZAD; ALI MAJDI; ASGHAR KHOLDI; SEUNG K. CHOI; MANSOOR GHANEEIAN; YOSEF HOMAYUN; S.M.B. CORPORATION; A.H.B. PROPERTIES, INC.; SAGAHOH, INC.; WARM SPRINGS UNOCAL, INC.;

No. 98-56631

D.C. No. CV-97-00161-ABC

DALLA, INC.; BEST CARE UNOCAL AUTO CENTER, INC.; CALABASAS UNOCAL, INC.; JOHN OTTE; GEORGE BENJAMIN,

Defendants - Appellants.

Before: NELSON, FERNANDEZ, and FLETCHER, Circuit Judges.

The panel has unanimously voted to deny the appellants' petition for rehearing. The suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX E

Sherman Antitrust Act, §§ 1, 2, 36 Stat. 209, as amended, 15 U.S.C. §§ 1, 2 (1990)

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, Sec. 1, 26 Stat. 209; Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693; July 7, 1955, ch. 281, 69 Stat. 282; Pub. L. 93-528, Sec. 3, Dec. 21, 1974, 88 Stat. 1708; Pub. L. 94-145, Sec. 2, Dec. 12, 1975, 89 Stat. 801; Pub. L. 101-588, Sec. 4(a), Nov. 16, 1990, 104 Stat. 2880.)

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years,

or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, Sec. 2, 26 Stat. 209; July 7, 1955, ch. 281, 69 Stat. 282; Pub. L. 93-528, Sec. 3, Dec. 21, 1974, 88 Stat. 1708; Pub. L. 101-588, Sec. 4(b), Nov. 16, 1990, 104 Stat. 2880.)

Clayton Antitrust Act, § 7,
38 Stat. 731, as amended,
15 U.S.C. § 18 (1996)

§ 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of

commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line

acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

(Oct. 15, 1914, ch. 323, Sec. 7, 38 Stat. 731; Dec. 29, 1950, ch. 1184, 64 Stat. 1125; Pub. L. 96-349, Sec. 6(a), Sept. 12, 1980, 94 Stat. 1157; Pub. L. 98-443, Sec. 9(1), Oct. 4, 1984, 98 Stat. 1708; Pub. L. 104-88, title III, Sec. 318(1), Dec. 29, 1995, 109 Stat. 949; Pub. L. 104-104, title VI, Sec. 601(b)(3), Feb. 8, 1996, 110 Stat. 143.)

Petroleum Marketing Practices Act,
15 U.S.C. § 2801, *et seq.*,
92 Stat. 322, *et seq.*,
as amended (1994)

§ 2801. Definitions

As used in this subchapter:

(1)(A) The term "franchise" means any contract –

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes –

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed –

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who –

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include –

(A) any failure which is only technical or unimportant to the franchise relationship;

(B) any failure for a cause beyond the reasonable control of the franchisee; or

(C) any failure based on a provision of the franchise which is illegal or unenforceable under the law of any State (or subdivision thereof).

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship –

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce –

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

(Pub. L. 95-297, title I, § 101, June 19, 1978, 92 Stat. 322; Pub. L. 103-371, § 6, Oct. 19, 1994, 108 Stat. 3486.)

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§ 2802. Franchise relationship

(a) General prohibition against termination or nonrenewal

Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may –

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal

(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if –

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure –

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if –

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence –

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if –

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if –

(i) such determination –

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises –

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if –

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if –

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of

any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if –

(i) such determination is –

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either –

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) Definition

As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as –

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if –

(A) the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise –

(i) of the duration of the underlying lease;, and

(ii) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of

termination) or at the end of such term (in the case of nonrenewal);

(B) during the 90-day period after notification was given pursuant to section 2804 of this title, the franchisor offers to assign to the franchisee any option to extend the underlying lease or option to purchase the marketing premises that is held by the franchisor, except that the franchisor may condition the assignment upon receipt by the franchisor of –

(i) an unconditional release executed by both the landowner and the franchisee releasing the franchisor from any and all liability accruing after the date of the assignment for –

(I) financial obligations under the option (or the resulting extended lease or purchase agreement);

(II) environmental contamination to (or originating from) the marketing premises; or

(III) the operation or condition of the marketing premises; and

(ii) an instrument executed by both the landowner and the franchisee that ensures the franchisor and the contractors of the franchisor reasonable access to the marketing premises for the purpose of testing for and remediating any environmental contamination that may be present at the premises; and

(C) in a situation in which the franchisee acquires possession of the leased marketing premises effective immediately after the loss of

the right of the franchisor to grant possession (through an assignment pursuant to subparagraph (B) or by obtaining a new lease or purchasing the marketing premises from the landowner), the franchisor (if requested in writing by the franchisee not later than 30 days after notification was given pursuant to section 2804 of this title), during the 90-day period after notification was given pursuant to section 2804 of this title –

(i) made a bona fide offer to sell, transfer, or assign to the franchisee the interest of the franchisor in any improvements or equipment located on the premises; or

(ii) if applicable, offered the franchisee a right of first refusal (for at least 45 days) of an offer, made by another person, to purchase the interest of the franchisor in the improvements and equipment.

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for –

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed) –

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and

operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

(Pub. L. 95-297, title I, § 102, June 19, 1978, 92 Stat. 324; Pub. L. 103-371, §§ 2, 3, Oct. 19, 1994, 108 Stat. 3484.)

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§ 2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions

The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship –

(1) under a trial franchise; or

(2) under an interim franchise.

(b) Definitions

For purposes of this section –

(1) The term "trial franchise" means any franchise –

(A) which is entered into on or after June 19, 1978;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously –

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise –

(A) which is entered into on or after June 19, 1978;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal –

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously –

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

(c) Nonrenewal upon meeting statutory notification requirements

If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship –

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if –

(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

(Pub. L. 95-297, title I, § 103, June 19, 1978, 92 Stat. 328.)

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§ 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor

Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship –

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(b) Additional requirements applicable to franchisor

(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section –

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor –

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins –

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall –

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Manner and form of notification

Notification under this section –

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain –

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

(d) Preparation, publication, etc., of statutory summaries

(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days

after it is so published rather than at the time required under such provisions.

(Pub. L. 95-297, title I, § 104, June 19, 1978, 92 Stat. 329.)

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§ 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of –

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any

failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if –

(A) the franchisee shows –

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced –

(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

(c) Burden of proof; burden of going forward with evidence

In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled –

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if

the franchisor demonstrates to the satisfaction of the court that –

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business –

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

(f) Release or waiver of rights

(1) No franchisor shall require, as a condition of entering into or renewing the franchise relationship, a franchisee to release or waive –

(A) any right that the franchisee has under this subchapter or other Federal law; or

(B) any right that the franchisee may have under any valid and applicable State law.

(2) No provision of any franchise shall be valid or enforceable if the provision specifies that the interpretation or enforcement of the franchise shall be governed by the law of any State other than the State in which the franchisee has the principal place of business of the franchisee.

(Pub. L. 95-297, title I, § 105, June 19, 1978, 92 Stat. 331; Pub. L. 103-371, § 4, Oct. 19, 1994, 108 Stat. 3485.)

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§ 2806. Relationship of statutory provisions to State and local laws

(a) Termination or nonrenewal of franchise

(1) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation

(including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(2) No State or political subdivision of a State may adopt, enforce, or continue in effect any provision of law (including a regulation) that requires a payment for the goodwill of a franchisee on the termination of a franchise or nonrenewal of a franchise relationship authorized by this subchapter.

(b) Transfer or assignment of franchise

(1) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) Nothing in this subchapter shall prohibit any State from specifying the terms and conditions under which any franchise or franchise relationship may be transferred to the designated successor of a franchisee upon the death of the franchisee.

(Pub. L. 95-297, title I, § 106, June 19, 1978, 92 Stat. 332; Pub. L. 103-371, § 5, Oct. 19, 1994, 108 Stat. 3485.)

Jurisdiction and Venue,
28 U.S.C. § 1254,
62 Stat. 928, as amended (1988)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928; June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

APPENDIX F

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHARLES SIMMONS, etc., et al., Plaintiffs, v. UNOCAL CORPORATION, UNION OIL COMPANY OF CALIFORNIA,	CASE NO. 97-1759 ABC JUDGMENT GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Jun. 1, 1998)

76 PRODUCTS COMPANY, INC.; and TOSCO CORPORATION, Defendants.	)	Date: March 30, 1998 Time: 9:30 a.m. Courtroom: 690 Before: Hon. Audrey B. Collins

The motion of defendants Tosco Corporation, Unocal Corporation and Union Oil Company of California (collectively "defendants") for summary judgment came on regularly for hearing on March 30, 1998 before this Court, the Honorable Audrey B. Collins presiding. All parties appeared through their respective counsel of record.

After full consideration of the evidence, and the separate statement of each party, and the authorities submitted by counsel, as well as counsel's oral argument, the Court finds there is no triable issue of material fact and that defendants are entitled to judgment as a matter of law on plaintiffs' last remaining claim pursuant to the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et. seq.*

IT IS THEREFORE ORDERED that defendants' motion for summary judgment is GRANTED and that judgment shall be entered forthwith in favor of defendants and against plaintiffs.

Dated: June 1, 1998

AUDREY COLLINS
The Honorable Audrey B. Collins

SUBMITTED BY:

LATHAM & WATKINS

By /s/ Gregory N. Pimstone
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNOCAL CORPORATION AND UNION OIL COMPANY OF CALIFORNIA, Plaintiffs, vs. ROBERT CASSEL; BARRY H. HENRY; MARY K. JULIAN; EBRAHIM KAABIPOUR; HASSAN KHAZIRI; HOSSAIN KHAZIRI; MOHSEN KHAZIRI; MICHAEL W. KRAYBILL; THOMAS L. PRICE; EVERGREEN UNION SERVICES, INC.; FARIBORZ (AKA NICK) NICKBAKHSH-TALI; ALI RAGHIAN;	Case No. 97-0161 ABC (SHx) [PROPOSED] JUDGMENT GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (Filed Jun. 11, 1998) Date: June 1, 1998 Time: 9:30 a.m. Ctrm: 690 Before: Hon. Audrey B. Collins

THUY GIA NGUYEN;)
LEAVESLEY RD UNION)
76 INC.; NOAH)
TOLLISON; TOM W.)
BARNUM; DAVID J.)
JOINES; RONALD GENE)
DIEDRICH; LJT, INC.;)
MARK HORNE; ZIAD)
SABBAH; CHARLES H.)
SIMMONS; LAWRENCE)
RAETHER; MEIR BEN-)
DAVID; SABOUR)
ANDKHOY; BASIR A.)
ANDKHOY; OMID)
BADAKHSH; AKBAR)
AKRAMI; SAYED)
YAQUB HASHEMYAR;)
ATA U RAHMAN)
TAJYAR; STEVEN)
TEDESCO; MANASSEH)
S. BAREH; DAVID)
AVISRUR; MEHRAN)
HARIRI; JAVAD TAAT;)
FARHAD PAKZAD; ALI)
MAJDI; ASGHAR)
KHOLDI; SEUNG KUI)
CHOI; DARYOUSH)
JAVAHERIAN;)
MANSOOR)
GHANEEIAN; YOSUF)
HOMAYUN; S.M.B.)
CORPORATION; BOURIS)
POULDAR; A.H.B.)
PROPERTIES, INC.;)
)

BELFORD POULDAR;)
SAGAHOH, INC.;)
HOVIG OSMANIAN;)
WARM SPRINGS)
UNOCAL, INC.; ALICE)
T. CHEN; DALLA, INC.;)
AZIZOLLAH (AKA)
AZIZ) BANAYAN; BEST)
CARE UNOCAL AUTO)
CENTER, INC.; JOSEPH)
G. BENJAMIN;)
CALABASAS UNOCAL,)
INC; JOHN OTTE; VU)
HADOUNG; TINOOSH)
EFTEKHARIAN; and)
Does 50-500,)
)
Defendants.)
_____)

The motion of plaintiffs Unocal Corporation and Union Oil Company of California (collectively "plaintiffs") for summary judgment came on regularly for hearing on June 1, 1998 before this Court, the Honorable Audrey B. Collins presiding. Plaintiffs and the "Simmons Defendants" appeared through their respective counsel of record.

After full consideration of the evidence, the separate statement of each party, the authorities submitted by counsel, and counsel's oral argument, the Court finds there is no triable issue of material fact and that plaintiffs are entitled to a declaratory judgment as a matter of law on plaintiffs' claims that plaintiffs' market withdrawal complied with the PMPA and that California Business

and Professions Code Section 20999.25(a) is preempted by the PMPA.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment is GRANTED and that a declaratory judgment shall be entered forthwith in favor of plaintiffs and against defendants.

Dated: June 11, 1998

AUDREY COLLINS
The Honorable Audrey B. Collins

SUBMITTED BY:

BROBECK, PHLEGER & HARRISON LLP

By /s/ Kenneth L. Waggoner
Kenneth L. Waggoner
Attorneys for Plaintiffs
Unocal Corporation and
Union Oil Company of California

APPENDIX G

Unocal Corporation
2929 East Imperial Highway
Brea, California 92621

UNOCAL 76

October 25, 1995

Dear Dealer/Marketer:

Today, news stories in the Orange County Register and Los Angeles Times stated that Unocal is planning to "sell, spin off or find a partner" for 76 Products Company by 1998. I'd like to comment on these assertions and clarify our intentions.

The information in the stories came from an interview I gave in New York last week. The discussion centered on Unocal's growth strategy for the years ahead – that is, to focus on high-potential resource development projects, primarily overseas.

In line with this strategy, we've sold peripheral businesses, reduced our ownership stake in others, and have announced the pending sale of our California upstream assets. Ultimately, we expect to change the ownership structure of our West Coast downstream operations as well. This could be accomplished through a partnership, a joint-venture arrangement, a stock offering, or a sale of 76 Products Company. This is an intention we've stated many times before, and is nothing new.

With that said, I'd like to emphasize two important points. First, we are fully committed to improving the downstream side of our business. On the contrary, we are committed to improving it. That's why we formed 76 Products Company last year, hired Larry Higby and put a

new management team in place. We're just now completing a major upgrade of our refineries to produce CARB reformulated gasoline, and we are also revamping our retail outlets. These are not small investments, and we're confident that they will pay off in improved performance and profitability for 76 Products Company.

Second, while we expect to make a change in the ownership structure of 76 Products Company within the next two or three years, we have set no definitive deadline. The nature and the timing of any action we take will depend on the opportunities before us. I can assure you that our foremost concern is to pursue the best interests of Unocal and 76 Products Company.

Sincerely,

Roger C. Beach
Chief Executive Officer

---

76 Products Company's Honolulu Terminal celeb . . .
Page 1 of 2

News Release

Unocal signs letter of intent to sell West Coast downstream assets to Tosco; deal valued at approximately $2 billion

El Segundo, Calif., Nov. 18, 1996 – Unocal today said it has signed a letter of intent to sell its West Coast petroleum refining, marketing and transportation assets to Stamford, Conn.-based Tosco Corporation.

The sale is valued between $1.9 and $2.1 billion, including $1.4 billion for the refining, marketing and transportation fixed assets, approximately $400 million for inventories, and up to $250 million in possible participation payments should gasoline margins increase in the next seven years. In addition, Unocal will liquidate $80 million in net receivables, which will not be part of this transaction.

The assets to be sold are currently operated by Unocal's 76 Products Company business unit, which is headquartered in Costa Mesa, Calif. The letter of intent anticipates that the sale will be closed in the first quarter of 1997.

"We are pleased with the proposed terms of this sale because they represent a significant value for our stockholders," said Roger C. Beach, Unocal chairman and chief executive officer.

Beach said that the sale of Unocal's West Coast refining, marketing and transportation assets is part of the company's long-term strategy to grow by pursuing large, long-life projects in Asia. "With this sale, we can focus on expanding our role as a major international energy producer and project developer and on strengthening our domestic U.S. oil and gas operations in the Louisiana/Gulf of Mexico region," he said. Beach also noted that the company's Diversified Business Group, which includes agricultural products, Molycorp, UNO-VEN, and other businesses, will continue to be an important part of Unocal's operations.

Beach said the company is building on its long experience and reputation from operations in Asia, particularly in Thailand, Indonesia and the Philippines. "We are now moving ahead with a variety of new projects throughout Asia," Beach said. He cited significant expansion of the company's operations in Thailand and Indonesia, the Yadana natural gas project in Myanmar, pipelines to transport crude oil and natural gas from Turkmenistan to markets in Pakistan, a new LPG terminal in China, exploration and development opportunities in Bangladesh and Vietnam, and an independent power project in Thailand.

The fixed assets that would be sold include Unocal's California refineries in San Francisco, Santa Maria and Los Angeles, which have a combined capacity of 251,000-barrels-per-day; various terminals, bulk plants and pipelines; Unocal's lubricants business; Unocal's retail marketing business, including approximately 1,100 controlled sites and 250 branded, non-controlled sites in six Western states; the company's commercial and industrial petroleum products business; three ocean-going tankers; inventories of hydrocarbon products; credit card systems; and other assets.

Unocal expects to record a $375 million aftertax book loss from the sale of the assets.

The sale is subject to negotiation of a final agreement; approval by various regulatory agencies and Tosco shareholders; and the satisfaction of certain other conditions. Tosco plans to use debt and equity financing for the purchase.

Proposed Terms of Sale

Sales Price	$1.4 billion for fixed assets Approximately $400 million for inventories
Net Receivables	Unocal will liquidate $80 million in net receivables, not part of the transaction
Participation Payment	$250 million cap; 7-year term; payment computed and paid semi-annually; portion of increase in gasoline margins above base average
Form of payment	100% cash (at closing, Tosco has option of giving Unocal up to $400 million in Tosco stock in lieu of cash)
Closing	First quarter 1997

Assets Information

Refineries	San Francisco Refinery (Rodeo, Calif.) – 77,000 b/d Santa Maria Refinery (Arroyo Grande, Calif.) – 44,000 b/d Los Angeles Refinery (Carson and Wilmington, Calif.) – 130,000 b/d
Retail marketing business	Approximately 1,100 controlled sites and 250 non-controlled sites in California, Arizona, Nevada, Oregon, Washington, and Hawaii
Ships	Three oceangoing vessels (Sierra Madre, Blue Ridge and Coast Range)
Other assets and businesses	Various terminals, bulk plants, and pipelines (excluding Avila, Calif., tanks, wharf and related facilities); Unocal lubricants business; Unocal

	commercial and industrial petroleum products business; Unocal's credit card (including co-branded card) systems
Book earnings impact of sale	Estimated $375 million aftertax loss for Unocal.

News Release Index

Contact: Barry Lane

Friday, March 21, 1997

San Francisco Chronicle

BUSINESS

Gas Prices Take Off In California

Despite falling crude oil costs, it's sticker shock at the pump

By Kenneth Howe Chronicle Staff Writer

Crude oil prices may be tanking, but that doesn't mean California drivers are enjoying lower prices at the gas pump.

Consumers are doling out an average of $1.32 per gallon for regular gasoline in California, according to the state's Energy Commission. That's up almost 12 cents a gallon, or about 10 percent since the beginning of the year.

Meanwhile, the price of crude oil, from which gasoline is made, has plunged $6 a barrel from $23.10 in late December.

What's going on? For one thing, analysis say pump prices don't always move in lock-step with crude prices. That's in part because crude prices are quoted for oil to be delivered in 30 days or later while gasoline is quoted in current prices.

Still, prices for gasoline and crude don't usually go in the opposite direction.

What's pushing up gasoline prices now, analysts say, is a relatively low level of gasoline inventory. Mobil and Chevron both have had refineries in California shut down for maintenance. The January explosion at the Tosco refinery in Martinez also lowered production.

This has reduced the overall inventory of gasoline in California to 3.8 million barrels of reformulated gasoline – 14 percent less than at this time last year.

"The short-term concern that is driving prices is the inventory supply," said Scott Berhang, an analyst with the Oil Price Information Service in Lakewood, N.J.

Because California law requires motorists to use a special reformulated gasoline, fuel from other parts of the country cannot easily be imported to fill out the inventory.

"Pretty soon, gasoline prices will reverse," said Peter Hughes, who follows gasoline prices for Olympian Oil in Los Angeles. He noted that gas prices in other parts of the nation have eased in the last few days in response to lower crude prices.

Average U.S. pump prices for self-serve gasoline fell 1.6 cents to $1.27 a gallon during the month ended March 16, according to the American Automobile Association.

Wholesale prices – the price charged by refiners to retailers – have also declined.

Yet gasoline prices have not.

"Some economists call this the rocket and the feather phenomenon," said Severin Borenstein, director of the Energy Institute at the University of California at Berkeley. "Prices go up like a rocket and come down like a feather."

Service station owners claim that when crude oil prices jump, they can't raise pump prices fast enough to cover their costs. If they do, they lose too many customers. So, when crude costs go down, station owners keep prices high to make up what they lost. However, Borenstein pointed out, "the data show that when prices go down service stations more than make up the money they lost when prices went up."

Borenstein is convinced that gasoline prices will come back down. "It is true that in the long run crude prices do drive retail prices," he said.

Some customer groups fear that the proposal by Shell Oil Co. and Texaco Inc. to merge their refining and marketing operations in the Midwest and West could reduce competition and drive gasoline prices even higher.

But Norman Higby, a Menlo Park oil analyst, says foreign competitors, capable of pushing down gasoline prices, are waiting in the wings to get into the U.S. gasoline market.

He noted that Saudi Refining, a Saudi Arabian oil company, is already a partner with Texaco in Star Enterprise, which refines and markets gasoline on the East

Coast. Shell and Texaco are contemplating an agreement to expand Star to the Midwest and West.

"What you are going to see is that major oil-producing companies will start directly marketing their product in the United States," Higby said.

It's already beginning to happen. CIT-GO, the big Tulsa, Okla., refiner with 13,000 gas stations in the Midwest, is a subsidiary of a Venezuelan oil company.

"U.S. refiners have not been able to consistently make money in refining," he said. "But the producing companies can because they already own the oil."

[Graph omitted in printing.]

76 Products Company

Management Meeting

July 9-10, 1996

* * *

STATUS OF DIVESTITURE EFFORTS

- Unocal remains committed to shedding 76P at the "right price"
- 76P "in play" as result of strong 2nd quarter earnings & favorable outlook
  - Target 76P EBITDA (Cash Margin) of $330 million appears achievable
- Goldman Sachs retained by Unocal to evaluate/create opportunities
  - Advises need at least 2 good quarters and evidence of 3rd
- Highest value believed to derive from Initial Purchase Offer ("IPO") as opposed to joint venture, merger or sale
- Unocal forming teams to perform due diligence necessary to create stand-alone entity & facilitate a transaction.

* * *

RETAIL MARKET SHARES
Metro West Coast Markets
Post Mergers - 1Q 1998

Company	LA	SD	SF	SAC	SEA	POR	PHO	TUC
Arco	24.7%	21.8%	14.2%	31.4%	24.0%	16.6%	17.0%	11.8%
ShelTex	17.7%	24.6%	20.8%	18.2%	25.7%	25.8%	16.1%	17.0%
Chevron	14.7%	12.4%	20.8%	14.9%	19.1%	20.4%	9.3%	20.7%
Tosco/76	13.8%	9.7%	18.1%	11.1%	22.8%	19.6%	28.6%	39.6%
Mobil	14.8%	9.9%	9.3%				18.9%	
Exxon			6.1%	6.9%				
Top 4	71.9%	68.7%	73.9%	75.6%	91.6%	82.4%	80.6%	89.1%

Source: Lundberg Market Share Reports (mid-1996)

1048907
UNOCAL CORP.

DL LEASE AND SUPPLY AGREEMENT
(CALIFORNIA)
TOSCO NORTHWEST COMPANY

Effective Date
Dealer's Name
Dealer's Soc. Sec. No.
Facility No.
Customer Account No.
Site No.
Home Address
Business Address

TABLE OF CONTENTS

		Page No.
1.	Lease of Facility	1
2.	Term	2
3.	Facility Rent	3
4.	Electronic Point of Sale Equipment	4
5.	Use Operation and Image of Facility	4
6.	Type of Business Changes	7
7.	Alternations, Maintenance and Repair	8
8.	Major Repairs	8
9.	Environmental Compliance	9
10.	Taxes, Fees and Utilities	10
11.	Supply of Products	11
12.	Minimum Volumes	11
13.	Quality and Claims	11
14.	Price of Products	12
15.	Terms of Payment	12

16. Credit Cards 13

17. Trademark and Service Mark 13

18. Dealer's Business-Indemnity 15

19. Insurance 16

20. Security Interest 17

21. Deliveries Delayed or Prevented 17

22. Surrender 18

23. Assignment-Subleasing 18

24. Termination 20

25. Repurchase of Inventory 22

26. Warranty 22

27. Confidentiality 22

28. Waiver 23

29. Underlying Lease 23

30. Severability 23

31. Entirety 23

32. Notices 24

33. Telecommunication 24

34. Audit 24

35. Authority to Sign Agreement 25

LEASE

* * *

3. Facility Rent

(a) Subject to subsections (b), (c) and (d) below, for each calendar month during the term of this Agreement, Dealer shall pay to Tosco (or its designee) rent for the Facility ("Monthly Facility Rent") as follows: the Monthly Facility Rent shall be $ ___ per month during the initial Contract Year. ___ per month during the second Contract Year and ___ per month during the third Contract Year. The Monthly Facility Rent is determined the following way:

(1) The Monthly Facility Rent will be an amount calculated by the following formula, as applicable: ($600 x the number of service bays) + ($1 per square foot of sales floor space for an existing snack shop at a Facility with service bays) + ($2 per square foot of sales floor space for an upgraded snack shop at a Facility with service bays) + + ($3.00 x the square footage of C-Store sales floor space rounded to the nearest 500 square feet) + ($250 x the number of Multiple Products Dispensers (MPD's)) + ($168 if the location has Card Readers In Dispensers (CRIND) + ($335 if the location has a Non-enhanced roll over car wash) + ($400 if the location has a Ryko Voyager or other enhanced car wash) + ($368 if the location has a high image canopy) + ($666 if the location has a Kiosk building) + ($.0075 x average monthly fuel volume for the preceding two years). For a Dealer that had a prior agreement for the Facility with Tosco or its immediate predecessor-in-interest, for each Contract Year, the increase in the Monthly Facility Rent under this Agreement shall not exceed $500 per month per contract

year when compared to the total monthly facility rent under the prior agreement until the monthly Facility Rent equals or exceeds the amount calculated by the formula in this subsection 3(a)(1).

(2) "Contract Year" means each successive 365 day period this Agreement is in effect.

(b) The Monthly Facility Rent shall be due and payable in advance on or before the last day of each preceding month. In the event the Monthly Facility Rent is not paid when due, it shall be subject to a late payment charge. The late payment charge shall be $60.00 and may be changed by Tosco from time to time. The Monthly Facility Rent for partial months shall be calculated as a daily rate of $^{1}/_{30}$th of the monthly amounts set forth herein.

(c) In addition to the Monthly Facility Rent set forth above, where not prohibited by law, Dealer shall pay an additional amount in rent for any capital improvements made to the location during the term of this contract which improvements were made by mutual agreement of Tosco and Dealer or in response to a requirement of law or of any federal, state or local governmental body or agency. The additional amount shall be calculated using the formula in section 3(a)(1).

(d) Tosco reserves the right to apply the Monthly Facility Rent formula in Section 3(a)(1) in a manner that is consistent with any additions, alterations,

changes or deletions to the Facility or the equipment situated thereon during the term hereof.

* * *

UNION 76 DEALER STATION LEASE

and

MOTOR FUEL SUPPLY AGREEMENT

[New Lease from Tosco]

TOSCO

Unit #35210/0072

TABLE OF CONTENTS

SUBJECT	SECTIONS	PAGE
PROPERTY	1	4
TERM	2	4
RENTAL	3	4
ELECTRONIC POINT OF SALE EQUIPMENT	4	4
SERVICES, USES AND DEFINITIONS	5	5
PROHIBITED USES	6	8
FIVE STAR STANDARDS PROGRAM	7	9
OPERATING EXPENSES	8	9
TAXES	9	9
TRADEMARKS	10	10

MOTOR FUELS BRANDS AND GRADES	11	10
PRODUCTS AND QUANTITY	12	10
DELIVERY	13	11
TITLE TO MOTOR FUEL AND STOCK LOSSES	14	12
ALLOCATION	15	12
PURCHASE PRICE	16	12
TERMS OF PAYMENT	17	12
CREDIT CARD SALES	18	13
SIGNS	19	13
NO EXCLUSIVE AREA	20	13
MAINTENANCE AND REPAIRS	21	14
MAJOR REPAIRS	22	14
ALTERATIONS AND BUSINESS CHANGES	23	15
ENVIRONMENTAL COMPLIANCE	24	15
INSPECTION OF STATION	25	17
RECORDS AND AUDITS	26	17
INDEMNITY	27	18
INSURANCE	28	19
ASSIGNMENTS, SUBLETTING AND TRANSFERS	29	20
TERMINATION BY TOSCO	30	22
TERMINATION BY DEALER	31	23
MUTUAL TERMINATION	32	24
SURRENDER OF PREMISES	33	24
REPURCHASE OF INVENTORY	34	24
CONDEMNATION	35	24
BANKRUPTCY	36	24
INDEPENDENT CONTRACTOR	37	25
NOTICE	38	25
FORCE MAJUERE	39	25
REVIEW OF AGREEMENT	40	26
SECTION TITLES	41	26
WAIVER	42	26

WARRANTY	43	26
CONFIDENTIALITY	44	26
SEVERABILITY	45	26
EXHIBITS	46	27
ENTIRE CONTRACT	47	27

EXHIBITS

Description of Real Property	Exhibit A-I
Buildings, Improvements, Fixtures & Equipment	Exhibit A-II
Rental Schedule	Exhibit B
Maintenance Responsibility	Exhibit C
Hours of Operation	Exhibit D
Quarterly/Annual Minimum Volume	Exhibit E
Petroleum Marketing Practices Act (PMPA)	Exhibit F
Underlying Lease	Addendum 1
Underground Storage Tanks /Owner/Operator Agreement	Addendum 2

UNION 76 DEALER STATION LEASE and MOTOR FUEL SUPPLY AGREEMENT

THIS UNION 76 dealer station lease and motor fuel supply agreement ("Agreement"), dated April 4, 1997 is by and between TOSCO MARKETING COMPANY, a division of TOSCO CORPORATION (hereinafter referred to as "TOSCO") and the individual(s) named below (hereinafter referred to as "DEALER"):

Omid Badakhsh

RECITALS

* * *

NOW, THEREFORE, in consideration of the mutual promises contained herein, TOSCO and DEALER agree as follows:

* * *

3. RENTAL.

(a) DEALER shall pay TOSCO rent for the Station as stated in Exhibit B. DEALER shall pay all rent ("Monthly Rent") and all other sums DEALER legally owes TOSCO in advance on or before the last day of each preceding month. In the event the Monthly Rent is not paid when due, it shall be subject to a late payment charge. The late payment charge shall be $60.00 and may be charged by TOSCO at TOSCO's option.

(b) Effective each July 1 of the Term hereof, and for the ensuing twelve (12) month period thereafter, DEALER agrees to pay a modified and adjusted Total Base Rent in

an amount equal to 100.0% of the Total Base Rent stated in the attached **Exhibit B**, plus an amount equal to the cumulative increase resulting from adjustments to the Total Base Rent based on the prior calendar years increase, plus one percent (1%) subject to an annual maximum of seven percent (7%), in the Consumer Price Index – All Urban Consumers ("CPIU"), published by the U.S. Department of Labor, Bureau of Labor Statistics for the Standard Metropolitan Statistical Area ("SMSA") in which DEALER's Station is located, or for the nearest SMSA to DEALER's Station if DEALER's Station is not located in an SMSA. For the purposes of any adjustment hereunder, the CPIU Index Base Year shall be 1992, for which the Index = 100.

* * *

[p. 85] MR. NOVITSKI: Yes.

MR. ALIOTO: Sally – what's her name?

MR. NOVITSKI: Piotrowski.

THE WITNESS: Piotrowski.

BY MR. ALIOTO:

Q. Well, did you conduct meetings without Ms. Piotrowski to determine which of the sections you were going to go forward with?

A. To the best of my knowledge, no.

Q. Did Ms. Piotrowski participate in the business decisions as to choosing which sections in these comparisons you were going to go with?

A. She offered advice and counsel.

Q. But she offered legal advice, I take it?

A. She was free to offer advice on any subject.

Q. Well, the businesspersons there were whom?

A. Myself, Greg Vasquez, Renae Popick. That's it.

Q. Did you four make determinations as to which sections of the different contracts you wanted to go with for economic reasons, business reasons, marketing reasons?

A. Yes.

[p. 86] Q. Are there some documents that show which ones you chose and why you chose them?

MR. NOVITSKI: He's distinguishing here between advice from your counsel versus a document that exhibits what you've chosen to do from a business standpoint.

THE WITNESS: I believe so.

BY MR. ALIOTO:

Q. Well, how did you know which ones you were choosing in order to put it into contracts to try to make them all similar?

A. There was a document – there were two documents, one begin the existing 76 contract and the other

being the existing BP contract, with numerous redline notes, etc., highlighting the differences between the contracts.

Q. Now, with that in front of you, how would you go about making a decision as to which one you're going to go for?

A. We would confer as a group and determine which one we felt was the better verbiage.

Q. After you did that, then was there some document that put it together as to the way you wanted it?

A. Well, sure. I would say it was the new [p. 87] contract.

Q. Which new contract? The new BP?

A. The new 76 contract.

Q. The new 76 contract, okay.

And then was the new BP contract modelled off the new 76 contract?

A. Yes.

Q. And is the Exxon contract, or the new Exxon contract – I've forgotten when you told me it was coming up – but whenever that one comes up, is that one modelled after the 76 contract?

A. Yes.

Q. Now, did you get the 76 contract?

A. Which one?

Q. The first one. The first one you used with your dealers.

MR. NOVITSKI: I think you've got to be more specific.

MR. ALIOTO: Okay.

MR. NOVITSKI: The first one to Tosco – or from Tosco?

MR. ALIOTO: Tosco, yeah.

BY MR. ALIOTO:

Q. When Tosco bought the Union 76, that transaction, Tosco offered the contract, new [p. 88] contract to, or a contract, to the 76 dealers; correct?

A. Correct.

Q. Was this the new contract that you've been talking about?

A. The new contract for 76 dealers, yes.

Q. So that means that you must have made these comparisons with all those other contracts, the BP contract, before you did the 76 contract.

A. Yes, that's correct.

Q. In making these different comparisons with these different contracts, did you use any part of the – well, I guess you wouldn't use any part of the Circle K, okay. So the only contracts that you were using then were the Exxon contracts and the BP contracts? Those are the only ones you had to be able to use to come up with the new 76 contract?

A. Well, remember the Exxon contract was identical, except for rent, to the BP contract.

Q. Okay. So in other words, BP contract, Exxon contract were the same, and so in order to make the new 76 contract you just wanted to do –

MR. NOVITSKI: I don't think the question's answerable.

[p. 89] MR. ALIOTO: All right. I'll withdraw it.

MR. NOVITSKI: Joe, can I just go back? I think also, just to clarify the record, he already testified that they had the existing 76 contracts.

MR. ALIOTO: Okay.

BY MR. ALIOTO:

Q. The existing 76 contracts, meaning the contracts that already existed between Union Oil and their dealers, you had those contracts?

A. Yes.

Q. Was the new 76 contract that you offered to the dealers the same as the old one?

A. It was not identical. It was very similar.

Q. But you used the old – let's call it the old 76 contract, okay? That's the one with Union.

A. I understand.

Q. So what you did, then, was you got the old 76 contract, what you've referred to as the old BP contract, and the Exxon contract and you attempted to compare them, and you came up with the new 76 contract?

A. Yes.

[p. 90] Q. And then with the new 76 contract you used that as a model to make the new BP contracts and the new Exxon contracts?

A. Yes.

Q. Do you remember which provisions in the old 76 contract were changed?

MR. NOVITSKI: In the new 76 contract?

MR. ALIOTO: Yeah, Okay.

THE WITNESS: No.

BY MR. ALIOTO:

Q. Do you remember which provisions in the old BP contract were changed?

MR. NOVITSKI: Compared to what?

MR. ALIOTO: To the new 76 contract.

THE WITNESS: Those changes are right here on these exhibits.

BY MR. ALIOTO:

Q. Do you remember them without referring to those exhibits?

MR. NOVITSKI: I'm going to object to calling them changes, because you're talking about a BP branded franchise agreement and a 76 franchise agreement, and you're asking him which he changed. They're different.

MR. ALIOTO: Right. I don't want to do [p. 91] this again, but all right.

BY MR. ALIOTO:

Q. Basically in order to come up with the new 76 contract, what you did, you and your group that you've identified, you took the old 76 contract that used to exist between the dealers and Union Oil, you took the old BP contract, and you took the Exxon contract which was the same as the old BP contract, and you then used all those to come up with the new 76 contract. Is that right?

A. Yes.

Q. And the new 76 contract had changes from the old 76 contract?

A. Yes.

Q. And the new 76 contract had changes from the old BP contract?

MR. NOVITSKI: I'm gong to object. I think that mischaracterizes prior testimony, but go ahead and answer if you can.

BY MR. ALIOTO:

Q. The new 76 contract had changes from the old BP; correct?

A. Yes.

Q. And therefore the old Exxon contract?

A. Yes.

[p. 92] Q. And having come up with the new 76 contract, then you modelled the new BP contracts and the new Exxon contracts off of the new 76 contract?

A. Yes.

Q. Do you remember the changes that were made from the old 76 contract as compared to the new 76 contract?

A. Not specifically.

Q. Do you remember without reference to the documents the changes you made from the old BP contract to the new 76 contract?

A. If you were specific as to the article or the paragraph, I might be able to answer that.

Q. Well, we went over rent somewhat, but that was one of the changes; is that correct?

A. That's correct.

MR. NOVITSKI: I'm sorry, are you asking what's different from the old BP versus the new 76 or what was adopted from the old BP and put into the new 76?

MR. ALIOTO: No, what was different.

BY MR. ALIOTO:

Q. Well, I take it then, that you did this analysis also on which ones you would adopt from [p. 93] the old 76 contracts and the old BP contracts –

A. That was the process.

Q. – too? Okay.

Did you add into the new 76 contract anything that was new or different? New, not included in the old 76 or not included in the old BP.

A. I don't recall specifically.

Q. In other words, did you come up with something new?

Q. I don't recall specifically. It was possible.

Q. I'm now going to call the old 76 and the old BP the old contracts. Certain portions of the old contracts were changed; that part's true?

A. If you're referring to the new 76 contract?

Q. Yes.

A. Yes.

Q. So some provisions of the old contracts were changed, some provisions of the old contracts were put into the new 76 contract; is that right?

A. That's correct.

Q. Is it also correct that some of the provisions of the old contracts were simply [p. 94] excluded from the new contract?

A. That's possible.

Q. Do you remember any that were excluded?

A. Not specifically.

Q. Do you remember any new ones that were added that weren't in any of them before?

A. Not specifically.

Q. We may be close to concluding here, but I would like you to list, as well as you can, what the economic or

competitive reasons were to come up with, one, contracts that were similar.

MR. NOVITSKI: I am going to object; lacks foundation.

THE WITNESS: Yeah, I'm not sure I understand.

BY MR. ALIOTO:

Q. You previously said that you had these different arrangements, Tosco did, with 76 dealers, BP dealers, Exxon dealers, and there were different contracts. You wanted to come up with one contract that was kind of similar to all of them. That part's correct, isn't it?

A. Yes.

Q. And you gave as a reason, one of the reasons, was administrative purposes. It would be [p. 95] easier to administer that kind of situation, I guess; right?

A. Yes.

Q. But you also said that there were economic reasons. Actually, you said there were many reasons in addition to administrative reasons; correct?

A. That's correct.

Q. Were there any reasons, any competitive reasons, for doing this?

A. What do you mean by competitive?

Q. Was there any reason with regard to your competition between other companies to have this one contract that was kind of similar for all the different stations?

A. I'm still not sure of your question.

Q. All right.

A. In what competitive – in what regard?

MR. NOVITSKI: You've answered by saying you don't understand. He'll take it from there.

BY MR. ALIOTO:

Q. Was one of the reasons why you wanted to have all these contracts similar because Tosco was of the view that by having these contracts similar it would somehow help them to be more competitive?

[p. 96] A. I think anytime that we review the contracts and have an opportunity to change them, then you would take into account what was existing in the marketplace with reference to competing brands.

Q. Were there any economic advantages other than administration to Tosco to try to make all these contracts similar?

A. Define economic advantages.

Q. Other than administration was this anything that would save money for Tosco?

A. I think it would depend on the specific article in the agreement.

Q. Was there anything that would make more money – forget saving money – make more money for Tosco?

A. I'd say that's possible.

Q. Was there any provision that lessened the obligations to Tosco?

MR. NOVITSKI: Comparing what to what?

MR. ALIOTO: Making a similar contract.

MR. NOVITSKI: No, by comparing which contracts?

BY MR. ALIOTO:

Q. Was one of the reasons for making all the

* * *

Nos. 99-446, 99-551

IN THE

Supreme Court of the United States

BASSAM HINDI, *et al.*,

Petitioners,

v.

TOSCO CORPORATION, *et al.*,

Respondents.

-and-

CHARLES SIMMONS, *et al.*,

Petitioners,

v.

UNOCAL CORPORATION, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY SIMMONS AND HINDI PETITIONS

1. As to the Petition filed by the Simmons group only, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that Tosco's acquisition of Union Oil Company of California's ("Union Oil") west coast assets pursuant to Union Oil's withdrawal from the geographic market did not violate the timing and "discrimination" provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-6 ("PMPA").

2. As to the Petitions filed by the Simmons and Hindi groups, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that the decision by Tosco Corporation to utilize synthetic leasing to finance a portion of the assets acquired from Union Oil did not contravene the PMPA.

3. As to the Petition filed by the Simmons group only, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that the Simmons group did not possess antitrust standing and had not suffered antitrust injury arising from Tosco's acquisition of Union Oil's west coast assets.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of Court, Respondents state as follows:

Tosco Corporation, T Northwest Properties II, Inc., and Clover Trust 1997-1, state that Tosco Corporation and Clover Trust 1997-1 do not have any parent corporations. T Northwest Properties II, Inc. is a wholly owned subsidiary of Tosco Corporation.

Union Oil is a wholly-owned subsidiary of Unocal Corporation.

There is no publicly held company that owns 10% or more of the stock of any Respondent.

TABLE OF CONTENTS

	Page
Questions Presented by Simmons and Hindi Petitions	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement	1
Argument	9
A. The PMPA Balances The Interests Of Franchisors and Franchisees	9
B. The Timing of the Withdrawal Did Not Violate the PMPA	11
C. Tosco's Use of Synthetic Leasing To Finance A Portion of the Transaction Did Not Contravene The PMPA	13
D. Tosco's Franchise Offers Were Not Discriminatory	19
E. The Court of Appeals Correctly Concluded That The Simmons Group Had Not Suffered Antitrust Injury and Lacked Antitrust Standing	22
Conclusion	27

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Chevron Corp., 933 F. Supp. 52 (D.D.C. 1996) 12

Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) 23

Avramidis v. Arco Petroleum Products Co., 798 F.2d 12 (1st Cir. 1986) 14, 15, 17, 20

Bhan v. NME Hospitals, Inc., 772 F.2d 1467 (9th Cir. 1985) 25

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) 23, 24

California v. American Stores Company, 495 U.S. 271 (1990) 26

Ellis v. Mobil Oil, 969 F.2d 784 (9th Cir. 1992) ... 15

Ewing v. Amoco Oil Co., 823 F.2d 1432 (10th Cir. 1987) 17, 20

Fresher v. Shell Oil Co., 846 F.2d 45 (9th Cir. 1988) 16

Cited Authorities

Page

In re Independence Village, 52 B.R. 715 (Bankr. E.D. Mich. 1985) 17

In re PCH Associates, 804 F.2d 193 (2d Cir. 1986) 17

John & Kostas Service Station Inc. v. Cumberland Farms, Inc., 948 F.2d 821 (1st Cir. 1991) 17

May-Som Gulf, Inc. v. Chevron USA, Inc., 869 F.2d 917 (6th Cir. 1989) 10, 12, 13, 16

Moreggia & Sons, Inc. v. Walsh, 852 F.2d 1179 (9th Cir. 1988) 16

Nelson v. Monroe Regional Medical Center, 925 F.2d 1555 (7th Cir. 1991) 26

R. C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139 (9th Cir. 1989) 23

Siecko v. Amerada Hess Corp., 569 F. Supp. 768 (E.D. Pa. 1983) 20

Southern Nevada Shell Dealers Ass'n v. Shell Oil Co., 725 F. Supp. 1104 (D. Nev. 1989) 20, 22

Sun Oil Company v. Commissioner of Internal Revenue, 562 F.2d 258 (3d Cir. 1977) 16, 17

Cited Authorities

Page

Valentine v. Mobil Oil Corp., 789 F.2d 1388 (9th Cir. 1986) 16, 20

Vinci v. Waste Management, Inc., 80 F.3d 1372 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1252 (1997) 25

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969) 23

Statutes:

15 U.S.C. § 1 23

15 U.S.C. § 18 23

15 U.S.C. §§ 2801-6 i

15 U.S.C. § 2801(9) 16

15 U.S.C. § 2802(b)(2)(E) 8, 11

15 U.S.C. § 2802(b)(2)(E)(i) 11

15 U.S.C. § 2802(b)(2)(E)(i)(I) 12

15 U.S.C. § 2802(b)(2)(E)(i)(II) 13

Cited Authorities

Page

15 U.S.C. § 2802(b)(2)(E)(iii) 14

15 U.S.C. § 2802(b)(2)(E)(iii)(I) 14

15 U.S.C. § 2802(b)(2)(E)(iii)(II) 7, 14, 15, 18, 19

15 U.S.C. § 2802(b)(3)(A) 20

Other Authority:

S. Rep. No. 95-731, at 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877 ..... 9, 10

STATEMENT

1. Union Oil withdrew from the retail marketing of motor fuel in the states of Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington. In doing so, Union Oil sold its marketing assets to Tosco. A number of former Union Oil franchisees objected to the sale on various grounds mostly arising out of the PMPA. In separate rulings, the district court ruled against all of them. Four groups of plaintiffs appealed to the Ninth Circuit Court of Appeals. Of the four groups, only two — the Hindi and Simmons groups — filed Petitions for a Writ of Certiorari. Respondents address both Petitions in this brief.

2. Unocal conducted its petroleum refining, transportation, and marketing business by and through its wholly owned subsidiary, Union Oil. In 1994, Union Oil established a separate unincorporated business unit, the 76 Products Company, to manage its refining and marketing operations, including a chain of more than 1200 service stations in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Those were operated under the terms of PMPA franchise agreements with Union Oil as the franchisor.

3. For several years, Unocal gave consideration to various ways of restructuring 76 Products, with the principal options being a spin-off of the entity, a joint venture arrangement, or a sale. Though early negotiations during the period fell through, Unocal continued to hear expressions of interest in acquiring the 76 Products business unit from several businesses, and in September 1996, began meeting with Tosco about the possibility that Tosco would purchase 76 Products. Nevertheless, other restructuring plans

continued and in October of 1996, Unocal management decided that the assets and employees of the 76 Products business unit should be transferred into a separate subsidiary. That plan was never consummated, but when it was announced, Unocal noted that it would be evaluating different options which could establish 76 Products as a separate entity, including an IPO, a joint venture, or a sale. Any future plans depended on the ability of 76 Products to develop sufficient earnings and cash flow as a stand alone business.

4. Discussions with Tosco continued, and by late October Tosco and Unocal were in active negotiations over a possible acquisition of 76 Products. Tosco offered to purchase the 76 Products business unit. The Union Oil board authorized a counter-offer on November 4, 1996, and a letter of intent calling for Union Oil to sell 76 Products to Tosco was signed by Tosco and Union Oil on November 17. Negotiation of specific agreements remained to be accomplished, and several conditions, including the approval of Union Oil's board, had to be met before the sale was formalized. On December 2, 1996, the Union Oil board conditionally approved the sale and purchase agreement and other agreements, and authorized Union Oil's management to enter into agreement with Tosco. The Management Committee of the Union Oil board authorized the signing of the sale and purchase agreement on December 13, 1996, and the sale then took place on December 14, 1996.

5. The assets sold included the premises of the "76" service stations, which were leased to the franchisees; Union Oil's interests in the franchise agreements with its dealers; the rights to the "76" and "Union 76" trademarks; and other assets, including refineries, pipelines, tankers, inventories, etc. The sale of 76 Products constituted a "market

withdrawal" as defined under the PMPA by Union Oil from the motor fuel market in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Union Oil was to terminate its franchises, but Tosco was also obligated to offer each Union Oil franchisee a nondiscriminatory, three-year petroleum marketing franchise. Between December 23 and 26, 1996, Union Oil sent all of its franchisees a letter notifying them of the termination or nonrenewal of their franchises, effective June 30, 1997, and, as required under the PMPA, Union Oil also notified the Governors of the affected states of its market withdrawal.

6. By April 15, 1997, Tosco offered petroleum marketing franchises, which were to become effective July 1, 1997, to the Union Oil franchisees. The new franchise contracts offered by Tosco essentially mirrored the prior contracts between Union Oil and the franchisees.

7. Tosco financed a portion of the acquisition through a secured financing vehicle known as synthetic leasing. None of the facts pertaining to Tosco's synthetic lease financing were disputed before the district court or the court of appeals. A synthetic lease is a financing arrangement first developed in the late 1980s and has become a commonly used means for publicly traded companies to finance asset acquisitions.

8. The synthetic lease is a form of financing structured to meet the Generally Accepted Accounting Principles ("GAAP") definition of an operating lease for accounting purposes, which gives the company off-balance sheet accounting treatment. At the same time, based on its attributes, the synthetic lease is viewed as a secured loan by the company for legal and tax purposes, since the company retains the risks and benefits of ownership of the assets being

financed. This financial structure is efficient because it provides low cost financing and is treated as an operating lease for book purposes. Therefore, neither the asset being financed nor the corresponding debt are reflected on the company's balance sheet, resulting in more competitive financial ratios, as is done by many of Tosco's competitors. (While the assets being financed and the corresponding liabilities do not appear in the financial statements, they are fully discussed in the Notes To Consolidated Financial Statements that are published with the financial statements.)

9. In the basic synthetic lease structure, a special purpose entity ("SPE") is formed to receive the loan from the lending institution, transmit the loan proceeds to the seller and acquire bare legal title to the properties. The SPE, here Respondent Clover Trust, is not an operating entity. The acquiring company or its subsidiary then enters into a short-term lease agreement with the SPE (with the SPE as lessor) with an option for the acquiring company to obtain title to the properties for a fixed price or pursuant to a fixed formula.

10. The acquiring company, here Tosco, assumes all operational and casualty risks of the properties and takes full responsibility for operating, maintaining and managing the assets. Because of these features, the lease appears and functions like a medium-term, revolving credit arrangement rather than a typical lease, with all the protections for the lessor in place that would apply in the case of a normal, medium-term, secured commercial loan to a company with a high credit rating.

11. Tax and bankruptcy authorities consider synthetic leases to be financing transactions, based primarily on factors such as the intent of the parties, the relatively small equity

investment by the SPE, the option to purchase the asset by the company at a later date, and the fact that all of the burdens, risks, rewards and responsibilities for the asset associated with ownership reside with the acquiring company (Tosco), which will enjoy any appreciation in the value of the property and bears the risk of asset depreciation. The Internal Revenue Service treats the transaction as a secured financing, viewing the company as the beneficial owner of the assets. The bankruptcy courts take the same approach, determining, based on the intent of the parties and the economic substance of the transaction, that the transaction should be treated as a financing arrangement.

12. Clover Trust was formed as the SPE to facilitate the "synthetic leasing" arrangement used by Tosco to finance a position of the purchase. Clover Trust received a loan from Sanwa Business Credit Corporation ("SBCC"), paid that money to Union Oil, took legal title to the properties and then entered into a short-term lease with Tosco's subsidiary, Northwest. Clover Trust agrees that its role in the transaction was to facilitate the acquisitions for Tosco. Tosco has the option of acquiring legal title via a fixed formula at the end of the lease. If it does not acquire title at the end of the lease, Tosco must still pay 75 to 80 percent of the loan's value, making acquisition of title a foregone conclusion. Tosco and Clover Trust intended that the transaction be treated as a secured loan to Tosco for tax purposes, that Tosco be entitled to all the benefits of ownership, and that "all payments of Termination Value and Fixed Rent . . . be treated as payments of principal and interest, as the case may be." Tosco assumed all of the operational and casualty risks for the properties and all responsibility for their management, and for practical purposes has the attributes and burdens of ownership. Tosco has all responsibility to insure and maintain the properties,

must keep them free of liens, and have the right to sublease to the franchisees. Tosco's option to purchase the properties is effectively at a specified price, so that it bears the risk of depreciation, receives the benefits of appreciation, and is responsible for compliance with the environmental laws.

13. If the Clover Trust lease were to terminate before any franchise agreement terminated, an addendum sent to the franchisees stated that "Tosco will exercise its option (or first right) to purchase the real property and improvements from the Clover Trust," after which the franchisees would lease their premises lease directly from Tosco, "rather than indirectly through the underlying lease" with Northwest. The Addendum further stated:

> if Tosco has determined to non-renew or terminate this Agreement, or any renewal thereof, pursuant to a provision of the Petroleum Marketing Practices Act (PMPA) which gives you the right to receive an offer to purchase the service station premises, you will receive from Tosco either a bona fide offer or a right of first refusal to purchase the marketing premises.

14. Once the transactions between Union Oil and Tosco were completed, including the renewal of the franchises, disputes commenced with a small percentage of the California franchisees whom asserted a desire to purchase the premises on which they were operating.

15. The Simmons group filed a complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged, among other things, that Union Oil violated the PMPA by entering into

and renewing franchise agreements after it had decided to withdraw from the market, and by utilizing the synthetic lease financing. It also alleged that Tosco violated the PMPA because it purportedly failed to offer non-discriminatory franchises. The district court granted summary judgment against the group and it appealed to the Ninth Circuit.

16. The Hindi group also filed a separate complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged that they violated the PMPA by utilizing synthetic lease financing. The district court granted summary judgment against the group and it, too, appealed.

17. On May 19, 1999, the court of appeals affirmed the district court's grants of summary judgment in total. The court of appeals published an opinion addressing the PMPA issues, which were asserted by the four groups of plaintiffs. The court addressed the Simmons group's antitrust claims and a discovery issue raised by that group in an unpublished memorandum opinion.

18. As to the PMPA arguments, the court of appeals followed unanimous precedent in holding that Union Oil did not violate any timing requirements in connection with its withdrawal, as it did not determine to withdraw from the market until its Board of Directors approved a resolution authorizing Union Oil to enter into an agreement with Tosco. The court of appeals also found unpersuasive the contention that Tosco's decision to utilize synthetic leasing to finance a portion of the transaction violated section 2802(b)(2)(E)(iii)(II) ("subsection II") of the PMPA, stating

> [n]othing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements.

Finally, the court of appeals concluded that Tosco's franchise offers, which were identical as to all the Union Oil franchisees and essentially mirrored their former franchise agreements with Union Oil, were not discriminatory.

19. As to the Simmons group's antitrust claims, the court of appeals affirmed the district court's grant of summary judgment, holding that the appellants' claimed injuries — the alleged loss of the opportunity to buy the service stations they operate and the possibility of increased wholesale prices from their own franchisor — were unfounded, constituting "rank speculation".

20. The Simmons group filed a Petition with this Court, asserting that the district court and court of appeals erred when they decided that Union Oil and Tosco properly adhered to the provisions of the PMPA. *See* 15 U.S.C. § 2802(b)(2)(E). The Simmons group further contends that the district court and court of appeals erred in concluding that petitioners did not suffer an antitrust injury and lacked antitrust standing.

21. The Hindi group filed a separate Petition asserting that the district court and court of appeals erred when they decided that Union Oil and Tosco properly adhered to the PMPA. Respondents address both Petitions in this consolidated brief.

ARGUMENT

The court of appeals correctly held that that Union Oil and Tosco properly adhered to the provisions of the PMPA with respect to: (1) the timing of the transaction; (2) the synthetic leasing financing mechanism chosen by Tosco; and (3) the offer of non-discriminatory franchises. The court's decision does not conflict with any decision of this Court or any decision rendered by the other circuits. Similarly, the court's ruling that the Simmons group did not suffer antitrust injury and lacked antitrust standing is fully consistent with the decisions of this Court and the other circuits. The Simmons Petition fails to cite any circuit decision or decision by this Court granting standing to franchisees in the context of a sale which, to the franchisees, merely has the effect of replacing one franchisor with another. None of these determinations warrants further review.

A. The PMPA Balances The Interests Of Franchisors and Franchisees

The PMPA was designed to offer additional protection to petroleum products franchisees from arbitrary or discriminatory termination of their franchise agreements or non-renewal of the franchise relationship. S. Rep. No. 95-731, at 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877. But that was not the only concern, for Congress also felt that what was "[n]eeded is a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non renewal of a franchise relationship." *Id.* Moreover, as Congress noted "[p]articularly important is that legislation dealing with this subject recognize the importance

of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.* "[I]n an age of increasing corporate competition, the major firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions." *May-Som Gulf, Inc. v. Chevron USA, Inc.*, 869 F.2d 917, 919, 921 (6th Cir. 1989). " 'In a rapidly changing economy fixed preservation of business relationships may spell financial death to the detriment of *franchisees* as well as franchisors.' " *Id.* at 922 (citation omitted).

In the context of a market withdrawal, the statute provides as follows:

> [A] determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located [is a ground for termination of a franchise or non-renewal of a franchise relationship], if —
>
> (i) such determination —
>
> (I) was made after the date such franchise was entered into or renewed, and
>
> (II) was based upon the occurrence of changes in relevant facts and circumstances after such date; . . . and

(iii) in the case of leased marketing premises —

. . .

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

15 U.S.C. § 2802(b)(2)(E).

Respondents turn to the specific issues in this case.

B. The Timing of the Withdrawal Did Not Violate the PMPA

The Simmons group argues that Union Oil violated the PMPA because it engaged in preliminary discussions about possible withdrawal options before franchises were renewed with group members and because relevant circumstances did not change after those franchises were renewed. *See* 15 U.S.C. § 2802(b)(2)(E)(i). Following unanimous

precedent, the court of appeals correctly found this argument unpersuasive. The Simmons petitioners cite no case supporting their position.

In order to meet the terms of 15 U.S.C. § 2802(b)(2)(E)(i)(I), Union Oil's actual decision to withdraw from the market must have been made after the date that the franchisees' franchises were entered into or renewed. The latest franchise renewal was October 1, 1996. The district court and court of appeals both ruled that the withdrawal determination was made on December 2, 1996, when Unocal's board approved a resolution authorizing Union Oil to enter into an agreement with Tosco. Thus, Union Oil met the requirements of § 2802(b)(2)(E)(i)(I).

In so ruling, the lower courts followed unanimous precedent. Generally, the approval of the franchisor's Board of Directors constitutes the legally effective date of a decision for PMPA purposes. *See May-Som*, 869 F.2d 917, 919, 927 (6th Cir. 1989) (holding that date franchisor's Board of Directors conditionally accepted buyer's bid was date market withdrawal decision was made); *Anderson v. Chevron Corp.*, 933 F. Supp. 52, 59 (D.D.C. 1996) (holding that "the day when the Board of Directors of defendant Chevron [the outgoing franchisor] tentatively approved the proposed exchange of assets with Exxon [the incoming franchisor], and instructed [its officers] to negotiate [and] execute a final exchange agreement" was date of market withdrawal decision). As the court of appeals noted, the logic of these cases is compelling. Weighing options is not the same as making a decision, and, absent evidence to the contrary, a corporation is not bound until its board acts. As the franchisees' own references to the evidence in the record indicate, years of considerations, negotiations, and false starts

had preceded the eventual deal with Tosco, and this, contrary to the franchisees' reasoning, suggests that courts should be wary about finding a fixed determination to withdraw at any point prior to the board's authoritative decision. Because none of the franchises was entered into or renewed after the decision to withdraw was made, the PMPA was not violated in this respect.

By the same token, the relevant facts and circumstances clearly changed after October 1, 1996, because only after that date was the sale to Tosco negotiated and a decision to withdraw reached. Therefore, 15 U.S.C. § 2802(b)(2)(E)(i)(II) was not violated either. *See May-Som Gulf*, 869 F.2d at 926 ("the presence of a willing and acceptable buyer is a fundamental change in market conditions").

The Simmons Petition fails to cite any decision that has held to the contrary. No further review is warranted.

C. Tosco's Use of Synthetic Leasing To Finance A Portion of the Transaction Did Not Contravene The PMPA

Petitioners also claim a violation of the PMPA because Tosco chose to utilize synthetic leasing as a means to finance its acquisition of a portion of the assets. The district court and court of appeals correctly determined that the PMPA does not prohibit financing techniques such as synthetic leasing, and that the franchisees were fully protected in the manner intended by the PMPA through the offer of new, non-discriminatory franchise agreements by Tosco that enabled the franchisees to continue operating their businesses in exactly the same manner as they had been doing before.

Petitioners do not point to any decision by this Court, or any decision by other circuit courts, holding synthetic leasing to be violative of the PMPA. Indeed, petitioners fail to cite any decision that has considered this truly arcane financing issue in the context of the PMPA. No further review is warranted.

When a franchisor terminates or nonrenews existing franchises or franchise relationships as part of a market withdrawal, section 2802(b)(2)(E)(iii) provides that the franchisor can either: (I) grant the franchisee a chance to match a bona fide offer to purchase the premises; or (II) sell, assign, or transfer the franchisor's interest to another person who will offer a non-discriminatory franchise to the franchisee.

Subsections (I) and (II) apply in different situations. Subsection (I) by its plain language contemplates a situation in which the withdrawing franchisor does *not* seek to sell the particular franchise as part of a transfer of its interest in multiple service stations to a new franchisor. *See, e.g., Avramidis v. Arco Petroleum Products Co.*, 798 F.2d 12, 15 at n.7 (1st Cir. 1986) ("Because Shell's purchase offer included some 400 Arco franchises, as well as numerous other assets, Subsection (E)(iii)(II) — requiring only that the purchasing franchisor offer the dealer a nondiscriminatory franchise — applied, rather than Subsection (E)(iii)(I) whose 'right of first refusal' provision contemplates the sale of a single franchise."). Recognizing that the franchisee should have greater rights in the service station property than a random buyer of the premises, the PMPA requires a franchisor who proceeds under this section to provide the franchisee the opportunity to purchase the premises so that the franchisee may continue its business in that location.

By contrast, Subsection (II) contemplates the situation when, as here, the withdrawing franchisor seeks to sell its interests in multiple service stations as a going concern to another franchisor. *See, e.g., Avramidis*, 798 F.2d at 15 n.7. Subsection (II) protects the franchisees from arbitrary or unfair treatment by the new franchisor by guaranteeing that the dealers will receive replacement franchises on fair terms, and thus can continue to remain in business at that location, as franchisees of the new franchisor. Subsection II requires that the old and new franchisors act in a manner consistent with "the overriding purpose of . . . the PMPA . . . to protect the franchisee's reasonable expectation of continuing the franchise relationship." *See Ellis v. Mobil Oil*, 969 F.2d 784, 788 (9th Cir. 1992).

The Petitioners argue that the terms of subsection II have not been met, nor can they be, because Clover Trust, the holder of legal title to the premises under the secured financing, is not a franchisor capable of offering nondiscriminatory franchises to the former Union Oil franchisees. The court of appeals correctly observed that this argument "is far too simplistic." That Clover Trust is not a franchisor, and cannot authorize anyone to use a trademark in connection with fuel sales, is legally irrelevant. The synthetic lease arrangement involving Clover Trust should not be considered a violation of subsection II, because Clover Trust is part of a special purpose financial arrangement whereby Tosco purchased the property, and Tosco was indeed capable of offering — and did offer — non-discriminatory franchises to the former Union Oil franchisees.

Nothing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom

the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements. The use of secured financing can facilitate large transactions like the one at hand, without adding any untoward instability to franchise arrangements. In that regard, in enacting the PMPA Congress did not wish to unduly interfere with the interests of the franchisor, who is, after all, the owner of the property involved. *See May-Som Gulf*, 869 F.2d at 921; *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391-92 (9th Cir. 1986). Union Oil had an interest in capitalizing on the investments it had made in the corporate identity and goodwill of the Union 76 brand, and it could fully recover that investment if it could sell a going concern, including trademarks, franchise operations, and service station premises.

The PMPA does not contain any internal definition of ownership, although it is rather expansive in its definition of "leased marketing premises," which it defines as premises "owned, leased, or in any way controlled by the franchisor." 15 U.S.C. § 2801(9); *see also Fresher v. Shell Oil Co.*, 846 F.2d 45, 46-47 (9th Cir. 1988). Tosco's control of the premises is absolute and real. Indeed, general law treats synthetic lease arrangements as transparent for tax and other legal purposes. The entire point of a synthetic lease is that it is treated as an operating lease for accounting purposes, but is otherwise regarded by all concerned, including the government, as a secured loan.[1]

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1. *See, e.g., Sun Oil Company v. Commissioner of Internal Revenue*, 562 F.2d 258 (3d Cir. 1977); Revenue Procedures 75-21, 75-28, 76-30; *Moreggia & Sons, Inc. v. Walsh*, 852 F.2d 1179 (9th Cir. 1988) (the test is the intent of the parties and the economic

(Cont'd)

The contention by the Hindi petitioners that the court of appeals' opinion contradicts other circuit decisions is meritless. (Hindi Pet. at 15) None of the three cases cited by petitioners involved synthetic leasing or any other issue involving financing. *See Avramidis*, 798 F.2d 12 (1st Cir. 1986); *John & Kostas Service Station Inc. v. Cumberland Farms, Inc.*, 948 F.2d 821 (1st Cir. 1991); and *Ewing v. Amoco Oil Co.*, 823 F.2d 1432 (10th Cir. 1987). The *Avramidis* matter involved issues relating to PMPA notice and discrimination; the *Kostas* matter involved whether the new franchisor offered discriminatory franchises; and the *Ewing* case also involved issues of discrimination by the new franchisor. Nothing about those cases even remotely suggests that the decision by the new franchisor to utilize synthetic leasing violates the PMPA.

The court of appeals correctly observed that the result of the individual arrangements was a single transaction whereby Tosco took over the ownership and franchise role formerly held by Union Oil. *See Sun Oil Co. v. C.I.R.*, 562 F.2d 258, 268-69 (3d Cir. 1977). In other words, as the court of appeals stated, "there is no reason to hold that an arrangement which is seen as a transparent financing arrangement with true ownership in a Tosco entity for other legal purposes should become opaque when we look at it through a PMPA lens."

(Cont'd)
substance of the arrangement, not the locus of title). *See also In re PCH Associates*, 804 F.2d 193 (2d Cir. 1986) (holding that the lease in a sale-leaseback financing transaction was not a "lease" for purposes of section 365, looking at the economic realities of the transaction); *In re Independence Village*, 52 B.R. 715 (Bankr. E.D. Mich. 1985) (the lease-purchase contract was determined, in substance, to be a security agreement giving the lessor an equitable mortgage in the real property; court based conclusion on its analysis of the intentions of the parties and the economic substance of the transaction).

Moreover, to allay any franchisee concerns, Tosco included in the Addendum to the franchise agreement a statement that it will purchase the property from Clover Trust if the lease ends before the termination of the franchise agreement. The Addendum also guarantees the franchisees a right of first refusal pursuant to the terms of the PMPA in case of non-renewal or termination. Thus, Tosco is contractually bound in its franchise agreement to protect the franchisees' expectations of an ongoing franchise relationship. That, again, underscores Tosco's understanding that in reality its obligations and rights are the same as they would be under a more conventional mortgage. It is a foregone conclusion Tosco will acquire legal title at the end of the synthetic lease term because the effective financial penalties would be very steep.

The franchisees have not shown any interests put at risk by the method used to sell the premises to Tosco. They are operating under the same franchise terms, and their reasonable expectations of a continuing franchise relationship have not been thwarted by the use of the synthetic lease. The franchisees are all exactly where they reasonably could have expected to be under the franchise agreements they made as retailers of 76 brand motor fuel had a more conventional financing arrangement been used. Life goes on as before, and they are receiving precisely the benefit of the franchise relationship for which they bargained. The synthetic lease should, therefore, be treated as the financing vehicle it is, and for PMPA purposes Tosco should be looked upon as the transferee. The court of appeals did not err in concluding that Subsection II was not violated by its use.

D. Tosco's Franchise Offers Were Not Discriminatory

The Simmons group asserts that the court of appeals erred in holding that Tosco's offers of new franchises were not discriminatory. *See* 15 U.S.C. § 2802(b)(2)(E)(iii)(II). The court of appeals did not err, and its ruling was consistent with the unanimous precedent. Indeed, Petitioners do not point to any decision holding to the contrary. No further review is warranted.

Under the PMPA, a franchisor may sell its franchise to another franchisor so long as the new franchisor "offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person **or** franchises then in effect and with respect to which such other person is the franchisor." § 2802(b)(2)(E)(iii)(II). (Emphasis supplied) Each location has a unique set of considerations based, for example, on its particular competitive situation or the contract terms already in place for existing, similarly situated franchisees. By phrasing subsection (E)(iii)(II) in the disjunctive, Congress understood the importance of providing the franchisor with the business flexibility to provide a new franchisee with the offer of a franchise that is comparable either to the other new franchises being offered *or* to existing franchises that may be more relevantly situated.[2]

---

2. For example, if the franchisor acquires additional franchises in the context of a market withdrawal, it may make business sense to offer leases to some of the new franchisees on terms that differ from each other but that mirror existing franchises in similar relevant circumstances (i.e., all service stations in XXXX County might be full-serve and operate 24 hours, which is expected by the residents

(Cont'd)

The terms of a franchisee's new franchise agreement need not be identical to those of every other franchise agreement; "[a] franchisor must be free to offer different terms at different franchise locations." *Ewing*, 823 F.2d at 1438. "The PMPA . . . only requires that the franchise terms be similar, i.e., not discriminatory, to other franchises currently in effect or currently being offered by the purchasing franchisor." *Southern Nevada Shell Dealers Ass'n v. Shell Oil Co.*, 725 F. Supp. 1104, 1109 (D. Nev. 1989); *see also Avramidis*, 798 F.2d at 13-14.

The "good faith" requirement looks to whether the franchisor's actions are intended to "conceal selective discrimination against individual franchises," *Southern Nevada Shell Dealers*, 725 F. Supp. at 1109, but "avoid[s] judicial scrutiny of the business judgment itself." *Id.*, *citing Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 772 (E.D. Pa. 1983). In the context of grounds for nonrenewal under § 2802(b)(3)(A) of the PMPA, courts have similarly sought to inquire into "good faith" without engaging in

> judicial second-guessing of "the economic impact of an otherwise legitimate business decision by the franchisor. So long as the franchisor does not have a discriminatory *motive* or use the altered terms as a pretext to avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith."

Valentine, 789 F.2d at 1392 (emphasis supplied).

(Cont'd)
and necessary in order to be competitive). On the other hand, for legitimate business reasons, the franchisor may want to provide all of the new franchisees with agreements materially similar to each other but that differ in some respects from existing leases which may not be relevantly situated or which may contain outdated terms that will be revised upon expiration of the existing franchises.

The Simmons group does not dispute that the franchise agreements offered by Tosco were essentially the same for each of the former Union Oil franchisees or that they mirrored those which the franchisees had with Union Oil. Their sole argument that they were offered "discriminatory" franchises is that Tosco's BP brand franchises outside California provided that the franchisees' rent shall remain the same throughout the lease term, whereas the new 76 brand franchises provide for yearly rent increases based on a formula tied to the consumer price index. Petitioners fail to point out that this provision, which they claim to be "discriminatory," was in their former Unocal agreements. It was merely carried through by Tosco in the replacement franchises as part of Tosco's efforts to have the new franchises mirror their former franchises, thereby minimizing any disruption from the change in franchisor.[3]

The district court and court of appeals did not deem it necessary to determine whether the PMPA requires any comparison to BP franchises in a different region because they correctly concluded that, even if such a comparison were required, the differences between the 76 and BP agreements would not amount to discrimination against the "76" franchisees. The Simmons petitioners fail to offer any evidence whatsoever that this one asserted difference between their 76 franchises and then-existing BP franchises was based on a discriminatory motive or that it was inserted in their leases as a pretext to disenfranchise them. Without a shred of evidence of any pretext or a discriminatory motive,

3. Indeed, the new 76 brand franchises offered to Appellants became the template for Tosco's existing franchises elsewhere, and Tosco's renewals of its BP leases in the Pacific northwest (and its Exxon franchises in Arizona) now also contain a rental increase provision.

they cannot establish their discrimination claim under the PMPA as a matter of law. All the more so here, when what Tosco decided to do was to offer its new franchisees precisely the terms they were accustomed to, rather than alter them. It is hard to see how use of the "76" franchise terms, which the franchisees had been living with for years, became evidence of bad faith when offered by Tosco, the new owner of the 76 brand. The mere fact that the amount of rent might differ from one place to another does not show discrimination. *See Southern Nevada Shell Dealers*, 725 F. Supp. at 1109. That is especially true when, as here, the complaining group members are all located in California, whereas the agreements to which they wish to be compared refer to franchisees in other states, who were accustomed to a different leasing regime.

The court of appeals and district court correctly found that the franchisees did not demonstrate any lack of good faith in Tosco's offer of franchises to them, and that they cannot show that they have been treated in a discriminatory fashion.

E. The Court of Appeals Correctly Concluded That The Simmons Group Had Not Suffered Antitrust Injury and Lacked Antitrust Standing

The court of appeals did not err in concluding in its unpublished memorandum that the Simmons group had not suffered antitrust injury and lacked antitrust standing. The Simmons group fails to point to any split in the circuits on this issue. Indeed, they do not cite to any decision whatsoever holding that petroleum franchisees suffer a cognizable antitrust injury and have antitrust standing to sue in circumstances such as this. The Simmons petitioners suffered no antitrust injury and lacked standing to assert any such claims.

The Simmons group asserts that the transfer of the Union 76 franchise interests and premises to Tosco was an antitrust violation under Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits combinations in restraint of trade, and Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions that may lessen competition. An antitrust plaintiff must demonstrate that the injury in question is "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977). If relief is sought under Section 4, the plaintiff must demonstrate standing, which is tested by the application of a number of factors, which seek to assure, among other things, that the asserted damage is not a matter of mere speculation as far as the plaintiff is concerned, and that, even if there were some damage, the plaintiff is truly an appropriate person to assert it for antitrust purposes.

Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 103 S. Ct. 897, 908, 74 L. Ed. 2d 723 (1983); *R. C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc). Section 16 is not quite as demanding, but it at least requires a showing that there is a significant threat impending. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969).

Petitioner's first claimed injury — loss of the right under the PMPA to purchase and own their currently leased stations — is related to the structure of the acquisition; specifically, whether it violated the PMPA.[4] This alleged injury is unrelated

4. Ironically, it is the fact of the acquisition that allegedly gives rise to Appellants' asserted rights under the PMPA and California statute to buy their leased stations. In other words, but for the

(Cont'd)

to any purported decrease in competition resulting from the acquisition. For example, if Unocal had sold its assets under an identical deal to a new market entrant, thereby resulting in no increase of market share, Petitioners would still have lost the asserted right to purchase their own stations. This alleged injury is not proximately caused by any asserted anticompetitive effects of the asset purchase. Clearly, it does not reflect "the type of loss that the claimed violations . . . would be likely to cause," and does not give rise to antitrust standing. *Brunswick*, 9 U.S. at 489. Moreover, there is not the slightest hint that Union Oil would have otherwise sold off its roughly $2,000,000,000 going concern in bits and pieces if it had not sold to Tosco, and that some benefit would thereby have been conferred upon the group members through individual offers of sale bu Union Oil to them.

The Simmons group argues that the court of appeals' opinion fails to address its other purported injury, namely, that the mere switch in franchisor might result in increased wholesale prices to them. (Simmons Pet. at 20). They are incorrect. The court of appeals specifically rejected that purported speculative injury. It stated, assuming the existence of additional market concentration for the sake of argument, that while "added concentration might threaten other wholesalers of gasoline, independent dealers, and consumers, there is little reason, and no evidence, to suggest that these franchisees are threatened by their own franchisor."[5] (Simmons Pet. App. at 39). The Court added:

(Cont'd)
allegedly anticompetitive acquisition, Appellants could not claim the alleged right to purchase. Therefore, the alleged anticompetitive acts of Unocal and Tosco simultaneously create and injure the same right. Appellants have alleged irreconcilably inconsistent positions.

5. Respondents note that the Tosco sale did not increase market concentration given that Tosco occupied less than one percent of the relevant market before the acquisition.

> We understand the desire of the group's members to escape the strictures of a franchise relationship and to sally forth on their own, but there is no indication that the frustration of that desire threatens an antitrust injury. At best, the assertion that they may be harmed is rank speculation which does not disclose a significant threat. *See*, e.g. *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 582-87, 590-91, 592-95 (3rd Cir. 1979).

The court of appeals correctly observed that, even if the franchisor were able to charge higher prices, the "franchisees are actually allies of their franchisor as all of them face the marketing efforts of others." *Id.*

Indeed, the franchisees cannot claim to be affected either by a decrease in competition between Tosco and Unocal or by any alleged general decrease in competition within the wholesale motor fuel market. Prior to the acquisition, there was no competition between Tosco and Unocal (or any other supplier) in the supply of motor fuel to Petitioners. They do not dispute that they were, and remain, "76" brand franchisees, bound by their former and current franchise agreements to purchase all of their motor fuel requirements directly from their franchisor — formerly Unocal and now Tosco. Quite simply, they do not participate and have never participated in a competitive market for the purchase of wholesale motor fuel. Petitioners cannot allege injury for price increases in a market in which they were not participants. *See Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1252 (1997), *quoting Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985).

Thus, even assuming that at some point there is an increase in the price of the "76" brand wholesale motor fuel that petitioners are now obligated to purchase from Tosco, that increase would not be the result of a lessening in competition, because there is not and has never been any competition in the sale of "76" brand wholesale motor fuel to them. Therefore, the court of appeals correctly determined that the Simmons group's speculation about possible wholesale price increases cannot constitute a cognizable antitrust injury suffered by them.[6]

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6. Accordingly, Petitioners' argument that they stand in the position of consumers or customers of the merged entity is without merit. They are branded franchisees who do not purchase their motor fuel on the wholesale open market, as might an independent dealer or a wholesale gasoline distributor. The Simmons group's citation to *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555 (7th Cir. 1991) thus is inapposite. In *Nelson*, the plaintiffs were patients of a medical center that merged with the only other health care provider in plaintiffs' hometown of Monroe, Wisconsin — an entity which plaintiffs had previously sued. The merged entity then refused to treat them. The Seventh Circuit held that the defendant's decision not to treat them was a direct result of the exercise of its market power and that but for the merger and the resultant monopoly, the plaintiffs might still be enjoying medical care in Monroe. In contrast, these petitioners are not "consumers" directly harmed by any alleged elimination of competition. They are branded franchisees in the exact same position now as they were when Unocal was their franchisor. Similarly, there is nothing about the *California v. American Stores Company*, 495 U.S. 271 (1990), decision that suggests that the Simons petitioners possess antitrust standing.

CONCLUSION

The petitions for a writ of certiorari filed by the Simmons and Hindi petitioners should be denied.

Respectfully submitted,

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Nos. 99-446, 99-551

IN THE

Supreme Court of the United States

BASSAM HINDI, *et al.*,

Petitioners,

v.

TOSCO CORPORATION, *et al.*,

Respondents.

-and-

CHARLES SIMMONS, *et al.*,

Petitioners,

v.

UNOCAL CORPORATION, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY SIMMONS AND HINDI PETITIONS

1. As to the Petition filed by the Simmons group only, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that Tosco's acquisition of Union Oil Company of California's ("Union Oil") west coast assets pursuant to Union Oil's withdrawal from the geographic market did not violate the timing and "discrimination" provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-6 ("PMPA").

2. As to the Petitions filed by the Simmons and Hindi groups, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that the decision by Tosco Corporation to utilize synthetic leasing to finance a portion of the assets acquired from Union Oil did not contravene the PMPA.

3. As to the Petition filed by the Simmons group only, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that the Simmons group did not possess antitrust standing and had not suffered antitrust injury arising from Tosco's acquisition of Union Oil's west coast assets.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of Court, Respondents state as follows:

Tosco Corporation, T Northwest Properties II, Inc., and Clover Trust 1997-1, state that Tosco Corporation and Clover Trust 1997-1 do not have any parent corporations. T Northwest Properties II, Inc. is a wholly owned subsidiary of Tosco Corporation.

Union Oil is a wholly-owned subsidiary of Unocal Corporation.

There is no publicly held company that owns 10% or more of the stock of any Respondent.

TABLE OF CONTENTS

	Page
Questions Presented by Simmons and Hindi Petitions	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement	1
Argument	9
A. The PMPA Balances The Interests Of Franchisors and Franchisees	9
B. The Timing of the Withdrawal Did Not Violate the PMPA	11
C. Tosco's Use of Synthetic Leasing To Finance A Portion of the Transaction Did Not Contravene The PMPA	13
D. Tosco's Franchise Offers Were Not Discriminatory	19
E. The Court of Appeals Correctly Concluded That The Simmons Group Had Not Suffered Antitrust Injury and Lacked Antitrust Standing	22
Conclusion	27

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Chevron Corp., 933 F. Supp. 52 (D.D.C. 1996) 12

Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) 23

Avramidis v. Arco Petroleum Products Co., 798 F.2d 12 (1st Cir. 1986) 14, 15, 17, 20

Bhan v. NME Hospitals, Inc., 772 F.2d 1467 (9th Cir. 1985) 25

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) 23, 24

California v. American Stores Company, 495 U.S. 271 (1990) 26

Ellis v. Mobil Oil, 969 F.2d 784 (9th Cir. 1992) ... 15

Ewing v. Amoco Oil Co., 823 F.2d 1432 (10th Cir. 1987) 17, 20

Fresher v. Shell Oil Co., 846 F.2d 45 (9th Cir. 1988) 16

Cited Authorities

Page

In re Independence Village, 52 B.R. 715 (Bankr. E.D. Mich. 1985) 17

In re PCH Associates, 804 F.2d 193 (2d Cir. 1986) 17

John & Kostas Service Station Inc. v. Cumberland Farms, Inc., 948 F.2d 821 (1st Cir. 1991) 17

May-Som Gulf, Inc. v. Chevron USA, Inc., 869 F.2d 917 (6th Cir. 1989) 10, 12, 13, 16

Moreggia & Sons, Inc. v. Walsh, 852 F.2d 1179 (9th Cir. 1988) 16

Nelson v. Monroe Regional Medical Center, 925 F.2d 1555 (7th Cir. 1991) 26

R. C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139 (9th Cir. 1989) 23

Siecko v. Amerada Hess Corp., 569 F. Supp. 768 (E.D. Pa. 1983) 20

Southern Nevada Shell Dealers Ass'n v. Shell Oil Co., 725 F. Supp. 1104 (D. Nev. 1989) 20, 22

Sun Oil Company v. Commissioner of Internal Revenue, 562 F.2d 258 (3d Cir. 1977) 16, 17

Cited Authorities

Page

Valentine v. Mobil Oil Corp., 789 F.2d 1388 (9th Cir. 1986) 16, 20

Vinci v. Waste Management, Inc., 80 F.3d 1372 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1252 (1997) 25

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969) 23

Statutes:

15 U.S.C. § 1 23

15 U.S.C. § 18 23

15 U.S.C. §§ 2801-6 i

15 U.S.C. § 2801(9) 16

15 U.S.C. § 2802(b)(2)(E) 8, 11

15 U.S.C. § 2802(b)(2)(E)(i) 11

15 U.S.C. § 2802(b)(2)(E)(i)(I) 12

15 U.S.C. § 2802(b)(2)(E)(i)(II) 13

Cited Authorities

	Page
15 U.S.C. § 2802(b)(2)(E)(iii)	14
15 U.S.C. § 2802(b)(2)(E)(iii)(I)	14
15 U.S.C. § 2802(b)(2)(E)(iii)(II)	7, 14, 15, 18, 19
15 U.S.C. § 2802(b)(3)(A)	20

Other Authority:

S. Rep. No. 95-731, at 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877 ..... 9, 10

STATEMENT

1. Union Oil withdrew from the retail marketing of motor fuel in the states of Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington. In doing so, Union Oil sold its marketing assets to Tosco. A number of former Union Oil franchisees objected to the sale on various grounds mostly arising out of the PMPA. In separate rulings, the district court ruled against all of them. Four groups of plaintiffs appealed to the Ninth Circuit Court of Appeals. Of the four groups, only two — the Hindi and Simmons groups — filed Petitions for a Writ of Certiorari. Respondents address both Petitions in this brief.

2. Unocal conducted its petroleum refining, transportation, and marketing business by and through its wholly owned subsidiary, Union Oil. In 1994, Union Oil established a separate unincorporated business unit, the 76 Products Company, to manage its refining and marketing operations, including a chain of more than 1200 service stations in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Those were operated under the terms of PMPA franchise agreements with Union Oil as the franchisor.

3. For several years, Unocal gave consideration to various ways of restructuring 76 Products, with the principal options being a spin-off of the entity, a joint venture arrangement, or a sale. Though early negotiations during the period fell through, Unocal continued to hear expressions of interest in acquiring the 76 Products business unit from several businesses, and in September 1996, began meeting with Tosco about the possibility that Tosco would purchase 76 Products. Nevertheless, other restructuring plans

continued and in October of 1996, Unocal management decided that the assets and employees of the 76 Products business unit should be transferred into a separate subsidiary. That plan was never consummated, but when it was announced, Unocal noted that it would be evaluating different options which could establish 76 Products as a separate entity, including an IPO, a joint venture, or a sale. Any future plans depended on the ability of 76 Products to develop sufficient earnings and cash flow as a stand alone business.

4. Discussions with Tosco continued, and by late October Tosco and Unocal were in active negotiations over a possible acquisition of 76 Products. Tosco offered to purchase the 76 Products business unit. The Union Oil board authorized a counter-offer on November 4, 1996, and a letter of intent calling for Union Oil to sell 76 Products to Tosco was signed by Tosco and Union Oil on November 17. Negotiation of specific agreements remained to be accomplished, and several conditions, including the approval of Union Oil's board, had to be met before the sale was formalized. On December 2, 1996, the Union Oil board conditionally approved the sale and purchase agreement and other agreements, and authorized Union Oil's management to enter into agreement with Tosco. The Management Committee of the Union Oil board authorized the signing of the sale and purchase agreement on December 13, 1996, and the sale then took place on December 14, 1996.

5. The assets sold included the premises of the "76" service stations, which were leased to the franchisees; Union Oil's interests in the franchise agreements with its dealers; the rights to the "76" and "Union 76" trademarks; and other assets, including refineries, pipelines, tankers, inventories, etc. The sale of 76 Products constituted a "market

withdrawal" as defined under the PMPA by Union Oil from the motor fuel market in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Union Oil was to terminate its franchises, but Tosco was also obligated to offer each Union Oil franchisee a nondiscriminatory, three-year petroleum marketing franchise. Between December 23 and 26, 1996, Union Oil sent all of its franchisees a letter notifying them of the termination or nonrenewal of their franchises, effective June 30, 1997, and, as required under the PMPA, Union Oil also notified the Governors of the affected states of its market withdrawal.

6. By April 15, 1997, Tosco offered petroleum marketing franchises, which were to become effective July 1, 1997, to the Union Oil franchisees. The new franchise contracts offered by Tosco essentially mirrored the prior contracts between Union Oil and the franchisees.

7. Tosco financed a portion of the acquisition through a secured financing vehicle known as synthetic leasing. None of the facts pertaining to Tosco's synthetic lease financing were disputed before the district court or the court of appeals. A synthetic lease is a financing arrangement first developed in the late 1980s and has become a commonly used means for publicly traded companies to finance asset acquisitions.

8. The synthetic lease is a form of financing structured to meet the Generally Accepted Accounting Principles ("GAAP") definition of an operating lease for accounting purposes, which gives the company off-balance sheet accounting treatment. At the same time, based on its attributes, the synthetic lease is viewed as a secured loan by the company for legal and tax purposes, since the company retains the risks and benefits of ownership of the assets being

financed. This financial structure is efficient because it provides low cost financing and is treated as an operating lease for book purposes. Therefore, neither the asset being financed nor the corresponding debt are reflected on the company's balance sheet, resulting in more competitive financial ratios, as is done by many of Tosco's competitors. (While the assets being financed and the corresponding liabilities do not appear in the financial statements, they are fully discussed in the Notes To Consolidated Financial Statements that are published with the financial statements.)

9. In the basic synthetic lease structure, a special purpose entity ("SPE") is formed to receive the loan from the lending institution, transmit the loan proceeds to the seller and acquire bare legal title to the properties. The SPE, here Respondent Clover Trust, is not an operating entity. The acquiring company or its subsidiary then enters into a short-term lease agreement with the SPE (with the SPE as lessor) with an option for the acquiring company to obtain title to the properties for a fixed price or pursuant to a fixed formula.

10. The acquiring company, here Tosco, assumes all operational and casualty risks of the properties and takes full responsibility for operating, maintaining and managing the assets. Because of these features, the lease appears and functions like a medium-term, revolving credit arrangement rather than a typical lease, with all the protections for the lessor in place that would apply in the case of a normal, medium-term, secured commercial loan to a company with a high credit rating.

11. Tax and bankruptcy authorities consider synthetic leases to be financing transactions, based primarily on factors such as the intent of the parties, the relatively small equity

investment by the SPE, the option to purchase the asset by the company at a later date, and the fact that all of the burdens, risks, rewards and responsibilities for the asset associated with ownership reside with the acquiring company (Tosco), which will enjoy any appreciation in the value of the property and bears the risk of asset depreciation. The Internal Revenue Service treats the transaction as a secured financing, viewing the company as the beneficial owner of the assets. The bankruptcy courts take the same approach, determining, based on the intent of the parties and the economic substance of the transaction, that the transaction should be treated as a financing arrangement.

12. Clover Trust was formed as the SPE to facilitate the "synthetic leasing" arrangement used by Tosco to finance a position of the purchase. Clover Trust received a loan from Sanwa Business Credit Corporation ("SBCC"), paid that money to Union Oil, took legal title to the properties and then entered into a short-term lease with Tosco's subsidiary, Northwest. Clover Trust agrees that its role in the transaction was to facilitate the acquisitions for Tosco. Tosco has the option of acquiring legal title via a fixed formula at the end of the lease. If it does not acquire title at the end of the lease, Tosco must still pay 75 to 80 percent of the loan's value, making acquisition of title a foregone conclusion. Tosco and Clover Trust intended that the transaction be treated as a secured loan to Tosco for tax purposes, that Tosco be entitled to all the benefits of ownership, and that "all payments of Termination Value and Fixed Rent . . . be treated as payments of principal and interest, as the case may be." Tosco assumed all of the operational and casualty risks for the properties and all responsibility for their management, and for practical purposes has the attributes and burdens of ownership. Tosco has all responsibility to insure and maintain the properties,

must keep them free of liens, and have the right to sublease to the franchisees. Tosco's option to purchase the properties is effectively at a specified price, so that it bears the risk of depreciation, receives the benefits of appreciation, and is responsible for compliance with the environmental laws.

13. If the Clover Trust lease were to terminate before any franchise agreement terminated, an addendum sent to the franchisees stated that "Tosco will exercise its option (or first right) to purchase the real property and improvements from the Clover Trust," after which the franchisees would lease their premises lease directly from Tosco, "rather than indirectly through the underlying lease" with Northwest. The Addendum further stated:

> if Tosco has determined to non-renew or terminate this Agreement, or any renewal thereof, pursuant to a provision of the Petroleum Marketing Practices Act (PMPA) which gives you the right to receive an offer to purchase the service station premises, you will receive from Tosco either a bona fide offer or a right of first refusal to purchase the marketing premises.

14. Once the transactions between Union Oil and Tosco were completed, including the renewal of the franchises, disputes commenced with a small percentage of the California franchisees whom asserted a desire to purchase the premises on which they were operating.

15. The Simmons group filed a complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged, among other things, that Union Oil violated the PMPA by entering into

and renewing franchise agreements after it had decided to withdraw from the market, and by utilizing the synthetic lease financing. It also alleged that Tosco violated the PMPA because it purportedly failed to offer non-discriminatory franchises. The district court granted summary judgment against the group and it appealed to the Ninth Circuit.

16. The Hindi group also filed a separate complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged that they violated the PMPA by utilizing synthetic lease financing. The district court granted summary judgment against the group and it, too, appealed.

17. On May 19, 1999, the court of appeals affirmed the district court's grants of summary judgment in total. The court of appeals published an opinion addressing the PMPA issues, which were asserted by the four groups of plaintiffs. The court addressed the Simmons group's antitrust claims and a discovery issue raised by that group in an unpublished memorandum opinion.

18. As to the PMPA arguments, the court of appeals followed unanimous precedent in holding that Union Oil did not violate any timing requirements in connection with its withdrawal, as it did not determine to withdraw from the market until its Board of Directors approved a resolution authorizing Union Oil to enter into an agreement with Tosco. The court of appeals also found unpersuasive the contention that Tosco's decision to utilize synthetic leasing to finance a portion of the transaction violated section 2802(b)(2)(E)(iii)(II) ("subsection II") of the PMPA, stating

> [n]othing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements.

Finally, the court of appeals concluded that Tosco's franchise offers, which were identical as to all the Union Oil franchisees and essentially mirrored their former franchise agreements with Union Oil, were not discriminatory.

19. As to the Simmons group's antitrust claims, the court of appeals affirmed the district court's grant of summary judgment, holding that the appellants' claimed injuries — the alleged loss of the opportunity to buy the service stations they operate and the possibility of increased wholesale prices from their own franchisor — were unfounded, constituting "rank speculation".

20. The Simmons group filed a Petition with this Court, asserting that the district court and court of appeals erred when they decided that Union Oil and Tosco properly adhered to the provisions of the PMPA. *See* 15 U.S.C. § 2802(b)(2)(E). The Simmons group further contends that the district court and court of appeals erred in concluding that petitioners did not suffer an antitrust injury and lacked antitrust standing.

21. The Hindi group filed a separate Petition asserting that the district court and court of appeals erred when they decided that Union Oil and Tosco properly adhered to the PMPA. Respondents address both Petitions in this consolidated brief.

ARGUMENT

The court of appeals correctly held that that Union Oil and Tosco properly adhered to the provisions of the PMPA with respect to: (1) the timing of the transaction; (2) the synthetic leasing financing mechanism chosen by Tosco; and (3) the offer of non-discriminatory franchises. The court's decision does not conflict with any decision of this Court or any decision rendered by the other circuits. Similarly, the court's ruling that the Simmons group did not suffer antitrust injury and lacked antitrust standing is fully consistent with the decisions of this Court and the other circuits. The Simmons Petition fails to cite any circuit decision or decision by this Court granting standing to franchisees in the context of a sale which, to the franchisees, merely has the effect of replacing one franchisor with another. None of these determinations warrants further review.

A. The PMPA Balances The Interests Of Franchisors and Franchisees

The PMPA was designed to offer additional protection to petroleum products franchisees from arbitrary or discriminatory termination of their franchise agreements or non-renewal of the franchise relationship. S. Rep. No. 95-731, at 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877. But that was not the only concern, for Congress also felt that what was "[n]eeded is a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non renewal of a franchise relationship." *Id.* Moreover, as Congress noted "[p]articularly important is that legislation dealing with this subject recognize the importance

of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.* "[I]n an age of increasing corporate competition, the major firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions." *May-Som Gulf, Inc. v. Chevron USA, Inc.*, 869 F.2d 917, 919, 921 (6th Cir. 1989). " 'In a rapidly changing economy fixed preservation of business relationships may spell financial death to the detriment of *franchisees* as well as franchisors.' " *Id.* at 922 (citation omitted).

In the context of a market withdrawal, the statute provides as follows:

> [A] determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located [is a ground for termination of a franchise or non-renewal of a franchise relationship], if —
>
> (i) such determination —
>
> (I) was made after the date such franchise was entered into or renewed, and
>
> (II) was based upon the occurrence of changes in relevant facts and circumstances after such date; . . . and

(iii) in the case of leased marketing premises —

. . .

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

15 U.S.C. § 2802(b)(2)(E).

Respondents turn to the specific issues in this case.

B. The Timing of the Withdrawal Did Not Violate the PMPA

The Simmons group argues that Union Oil violated the PMPA because it engaged in preliminary discussions about possible withdrawal options before franchises were renewed with group members and because relevant circumstances did not change after those franchises were renewed. *See* 15 U.S.C. § 2802(b)(2)(E)(i). Following unanimous

precedent, the court of appeals correctly found this argument unpersuasive. The Simmons petitioners cite no case supporting their position.

In order to meet the terms of 15 U.S.C. § 2802(b)(2)(E)(i)(I), Union Oil's actual decision to withdraw from the market must have been made after the date that the franchisees' franchises were entered into or renewed. The latest franchise renewal was October 1, 1996. The district court and court of appeals both ruled that the withdrawal determination was made on December 2, 1996, when Unocal's board approved a resolution authorizing Union Oil to enter into an agreement with Tosco. Thus, Union Oil met the requirements of § 2802(b)(2)(E)(i)(I).

In so ruling, the lower courts followed unanimous precedent. Generally, the approval of the franchisor's Board of Directors constitutes the legally effective date of a decision for PMPA purposes. *See May-Som*, 869 F.2d 917, 919, 927 (6th Cir. 1989) (holding that date franchisor's Board of Directors conditionally accepted buyer's bid was date market withdrawal decision was made); *Anderson v. Chevron Corp.*, 933 F. Supp. 52, 59 (D.D.C. 1996) (holding that "the day when the Board of Directors of defendant Chevron [the outgoing franchisor] tentatively approved the proposed exchange of assets with Exxon [the incoming franchisor], and instructed [its officers] to negotiate [and] execute a final exchange agreement" was date of market withdrawal decision). As the court of appeals noted, the logic of these cases is compelling. Weighing options is not the same as making a decision, and, absent evidence to the contrary, a corporation is not bound until its board acts. As the franchisees' own references to the evidence in the record indicate, years of considerations, negotiations, and false starts

had preceded the eventual deal with Tosco, and this, contrary to the franchisees' reasoning, suggests that courts should be wary about finding a fixed determination to withdraw at any point prior to the board's authoritative decision. Because none of the franchises was entered into or renewed after the decision to withdraw was made, the PMPA was not violated in this respect.

By the same token, the relevant facts and circumstances clearly changed after October 1, 1996, because only after that date was the sale to Tosco negotiated and a decision to withdraw reached. Therefore, 15 U.S.C. § 2802(b)(2)(E)(i)(II) was not violated either. *See May-Som Gulf*, 869 F.2d at 926 ("the presence of a willing and acceptable buyer is a fundamental change in market conditions").

The Simmons Petition fails to cite any decision that has held to the contrary. No further review is warranted.

C. Tosco's Use of Synthetic Leasing To Finance A Portion of the Transaction Did Not Contravene The PMPA

Petitioners also claim a violation of the PMPA because Tosco chose to utilize synthetic leasing as a means to finance its acquisition of a portion of the assets. The district court and court of appeals correctly determined that the PMPA does not prohibit financing techniques such as synthetic leasing, and that the franchisees were fully protected in the manner intended by the PMPA through the offer of new, non-discriminatory franchise agreements by Tosco that enabled the franchisees to continue operating their businesses in exactly the same manner as they had been doing before.

Petitioners do not point to any decision by this Court, or any decision by other circuit courts, holding synthetic leasing to be violative of the PMPA. Indeed, petitioners fail to cite any decision that has considered this truly arcane financing issue in the context of the PMPA. No further review is warranted.

When a franchisor terminates or nonrenews existing franchises or franchise relationships as part of a market withdrawal, section 2802(b)(2)(E)(iii) provides that the franchisor can either: (I) grant the franchisee a chance to match a bona fide offer to purchase the premises; or (II) sell, assign, or transfer the franchisor's interest to another person who will offer a non-discriminatory franchise to the franchisee.

Subsections (I) and (II) apply in different situations. Subsection (I) by its plain language contemplates a situation in which the withdrawing franchisor does *not* seek to sell the particular franchise as part of a transfer of its interest in multiple service stations to a new franchisor. *See, e.g., Avramidis v. Arco Petroleum Products Co.*, 798 F.2d 12, 15 at n.7 (1st Cir. 1986) ("Because Shell's purchase offer included some 400 Arco franchises, as well as numerous other assets, Subsection (E)(iii)(II) — requiring only that the purchasing franchisor offer the dealer a nondiscriminatory franchise — applied, rather than Subsection (E)(iii)(I) whose 'right of first refusal' provision contemplates the sale of a single franchise."). Recognizing that the franchisee should have greater rights in the service station property than a random buyer of the premises, the PMPA requires a franchisor who proceeds under this section to provide the franchisee the opportunity to purchase the premises so that the franchisee may continue its business in that location.

By contrast, Subsection (II) contemplates the situation when, as here, the withdrawing franchisor seeks to sell its interests in multiple service stations as a going concern to another franchisor. *See, e.g., Avramidis*, 798 F.2d at 15 n.7. Subsection (II) protects the franchisees from arbitrary or unfair treatment by the new franchisor by guaranteeing that the dealers will receive replacement franchises on fair terms, and thus can continue to remain in business at that location, as franchisees of the new franchisor. Subsection II requires that the old and new franchisors act in a manner consistent with "the overriding purpose of . . . the PMPA . . . to protect the franchisee's reasonable expectation of continuing the franchise relationship." *See Ellis v. Mobil Oil*, 969 F.2d 784, 788 (9th Cir. 1992).

The Petitioners argue that the terms of subsection II have not been met, nor can they be, because Clover Trust, the holder of legal title to the premises under the secured financing, is not a franchisor capable of offering nondiscriminatory franchises to the former Union Oil franchisees. The court of appeals correctly observed that this argument "is far too simplistic." That Clover Trust is not a franchisor, and cannot authorize anyone to use a trademark in connection with fuel sales, is legally irrelevant. The synthetic lease arrangement involving Clover Trust should not be considered a violation of subsection II, because Clover Trust is part of a special purpose financial arrangement whereby Tosco purchased the property, and Tosco was indeed capable of offering — and did offer — non-discriminatory franchises to the former Union Oil franchisees.

Nothing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom

the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements. The use of secured financing can facilitate large transactions like the one at hand, without adding any untoward instability to franchise arrangements. In that regard, in enacting the PMPA Congress did not wish to unduly interfere with the interests of the franchisor, who is, after all, the owner of the property involved. *See May-Som Gulf,* 869 F.2d at 921; *Valentine v. Mobil Oil Corp.,* 789 F.2d 1388, 1391-92 (9th Cir. 1986). Union Oil had an interest in capitalizing on the investments it had made in the corporate identity and goodwill of the Union 76 brand, and it could fully recover that investment if it could sell a going concern, including trademarks, franchise operations, and service station premises.

The PMPA does not contain any internal definition of ownership, although it is rather expansive in its definition of "leased marketing premises," which it defines as premises "owned, leased, or in any way controlled by the franchisor." 15 U.S.C. § 2801(9); *see also Fresher v. Shell Oil Co.,* 846 F.2d 45, 46-47 (9th Cir. 1988). Tosco's control of the premises is absolute and real. Indeed, general law treats synthetic lease arrangements as transparent for tax and other legal purposes. The entire point of a synthetic lease is that it is treated as an operating lease for accounting purposes, but is otherwise regarded by all concerned, including the government, as a secured loan.[1]

1. *See, e.g., Sun Oil Company v. Commissioner of Internal Revenue*, 562 F.2d 258 (3d Cir. 1977); Revenue Procedures 75-21, 75-28, 76-30; *Moreggia & Sons, Inc. v. Walsh*, 852 F.2d 1179 (9th Cir. 1988) (the test is the intent of the parties and the economic

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The contention by the Hindi petitioners that the court of appeals' opinion contradicts other circuit decisions is meritless. (Hindi Pet. at 15) None of the three cases cited by petitioners involved synthetic leasing or any other issue involving financing. *See Avramidis*, 798 F.2d 12 (1st Cir. 1986); *John & Kostas Service Station Inc. v. Cumberland Farms, Inc.*, 948 F.2d 821 (1st Cir. 1991); and *Ewing v. Amoco Oil Co.*, 823 F.2d 1432 (10th Cir. 1987). The *Avramidis* matter involved issues relating to PMPA notice and discrimination; the *Kostas* matter involved whether the new franchisor offered discriminatory franchises; and the *Ewing* case also involved issues of discrimination by the new franchisor. Nothing about those cases even remotely suggests that the decision by the new franchisor to utilize synthetic leasing violates the PMPA.

The court of appeals correctly observed that the result of the individual arrangements was a single transaction whereby Tosco took over the ownership and franchise role formerly held by Union Oil. *See Sun Oil Co. v. C.I.R.*, 562 F.2d 258, 268-69 (3d Cir. 1977). In other words, as the court of appeals stated, "there is no reason to hold that an arrangement which is seen as a transparent financing arrangement with true ownership in a Tosco entity for other legal purposes should become opaque when we look at it through a PMPA lens."

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substance of the arrangement, not the locus of title). *See also In re PCH Associates*, 804 F.2d 193 (2d Cir. 1986) (holding that the lease in a sale-leaseback financing transaction was not a "lease" for purposes of section 365, looking at the economic realities of the transaction); *In re Independence Village*, 52 B.R. 715 (Bankr. E.D. Mich. 1985) (the lease-purchase contract was determined, in substance, to be a security agreement giving the lessor an equitable mortgage in the real property; court based conclusion on its analysis of the intentions of the parties and the economic substance of the transaction).

Moreover, to allay any franchisee concerns, Tosco included in the Addendum to the franchise agreement a statement that it will purchase the property from Clover Trust if the lease ends before the termination of the franchise agreement. The Addendum also guarantees the franchisees a right of first refusal pursuant to the terms of the PMPA in case of non-renewal or termination. Thus, Tosco is contractually bound in its franchise agreement to protect the franchisees' expectations of an ongoing franchise relationship. That, again, underscores Tosco's understanding that in reality its obligations and rights are the same as they would be under a more conventional mortgage. It is a foregone conclusion Tosco will acquire legal title at the end of the synthetic lease term because the effective financial penalties would be very steep.

The franchisees have not shown any interests put at risk by the method used to sell the premises to Tosco. They are operating under the same franchise terms, and their reasonable expectations of a continuing franchise relationship have not been thwarted by the use of the synthetic lease. The franchisees are all exactly where they reasonably could have expected to be under the franchise agreements they made as retailers of 76 brand motor fuel had a more conventional financing arrangement been used. Life goes on as before, and they are receiving precisely the benefit of the franchise relationship for which they bargained. The synthetic lease should, therefore, be treated as the financing vehicle it is, and for PMPA purposes Tosco should be looked upon as the transferee. The court of appeals did not err in concluding that Subsection II was not violated by its use.

D. Tosco's Franchise Offers Were Not Discriminatory

The Simmons group asserts that the court of appeals erred in holding that Tosco's offers of new franchises were not discriminatory. *See* 15 U.S.C. § 2802(b)(2)(E)(iii)(II). The court of appeals did not err, and its ruling was consistent with the unanimous precedent. Indeed, Petitioners do not point to any decision holding to the contrary. No further review is warranted.

Under the PMPA, a franchisor may sell its franchise to another franchisor so long as the new franchisor "offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person **or** franchises then in effect and with respect to which such other person is the franchisor." § 2802(b)(2)(E)(iii)(II). (Emphasis supplied) Each location has a unique set of considerations based, for example, on its particular competitive situation or the contract terms already in place for existing, similarly situated franchisees. By phrasing subsection (E)(iii)(II) in the disjunctive, Congress understood the importance of providing the franchisor with the business flexibility to provide a new franchisee with the offer of a franchise that is comparable either to the other new franchises being offered *or* to existing franchises that may be more relevantly situated.[2]

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2. For example, if the franchisor acquires additional franchises in the context of a market withdrawal, it may make business sense to offer leases to some of the new franchisees on terms that differ from each other but that mirror existing franchises in similar relevant circumstances (i.e., all service stations in XXXX County might be full-serve and operate 24 hours, which is expected by the residents

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The terms of a franchisee's new franchise agreement need not be identical to those of every other franchise agreement; "[a] franchisor must be free to offer different terms at different franchise locations." *Ewing*, 823 F.2d at 1438. "The PMPA . . . only requires that the franchise terms be similar, i.e., not discriminatory, to other franchises currently in effect or currently being offered by the purchasing franchisor." *Southern Nevada Shell Dealers Ass'n v. Shell Oil Co.*, 725 F. Supp. 1104, 1109 (D. Nev. 1989); *see also Avramidis*, 798 F.2d at 13-14.

The "good faith" requirement looks to whether the franchisor's actions are intended to "conceal selective discrimination against individual franchises," *Southern Nevada Shell Dealers*, 725 F. Supp. at 1109, but "avoid[s] judicial scrutiny of the business judgment itself." *Id., citing Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 772 (E.D. Pa. 1983). In the context of grounds for nonrenewal under § 2802(b)(3)(A) of the PMPA, courts have similarly sought to inquire into "good faith" without engaging in

> judicial second-guessing of "the economic impact of an otherwise legitimate business decision by the franchisor. So long as the franchisor does not have a discriminatory *motive* or use the altered terms as a pretext to avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith."

Valentine, 789 F.2d at 1392 (emphasis supplied).

(Cont'd)
and necessary in order to be competitive). On the other hand, for legitimate business reasons, the franchisor may want to provide all of the new franchisees with agreements materially similar to each other but that differ in some respects from existing leases which may not be relevantly situated or which may contain outdated terms that will be revised upon expiration of the existing franchises.

The Simmons group does not dispute that the franchise agreements offered by Tosco were essentially the same for each of the former Union Oil franchisees or that they mirrored those which the franchisees had with Union Oil. Their sole argument that they were offered "discriminatory" franchises is that Tosco's BP brand franchises outside California provided that the franchisees' rent shall remain the same throughout the lease term, whereas the new 76 brand franchises provide for yearly rent increases based on a formula tied to the consumer price index. Petitioners fail to point out that this provision, which they claim to be "discriminatory," was in their former Unocal agreements. It was merely carried through by Tosco in the replacement franchises as part of Tosco's efforts to have the new franchises mirror their former franchises, thereby minimizing any disruption from the change in franchisor.[3]

The district court and court of appeals did not deem it necessary to determine whether the PMPA requires any comparison to BP franchises in a different region because they correctly concluded that, even if such a comparison were required, the differences between the 76 and BP agreements would not amount to discrimination against the "76" franchisees. The Simmons petitioners fail to offer any evidence whatsoever that this one asserted difference between their 76 franchises and then-existing BP franchises was based on a discriminatory motive or that it was inserted in their leases as a pretext to disenfranchise them. Without a shred of evidence of any pretext or a discriminatory motive,

3. Indeed, the new 76 brand franchises offered to Appellants became the template for Tosco's existing franchises elsewhere, and Tosco's renewals of its BP leases in the Pacific northwest (and its Exxon franchises in Arizona) now also contain a rental increase provision.

they cannot establish their discrimination claim under the PMPA as a matter of law. All the more so here, when what Tosco decided to do was to offer its new franchisees precisely the terms they were accustomed to, rather than alter them. It is hard to see how use of the "76" franchise terms, which the franchisees had been living with for years, became evidence of bad faith when offered by Tosco, the new owner of the 76 brand. The mere fact that the amount of rent might differ from one place to another does not show discrimination. *See Southern Nevada Shell Dealers*, 725 F. Supp. at 1109. That is especially true when, as here, the complaining group members are all located in California, whereas the agreements to which they wish to be compared refer to franchisees in other states, who were accustomed to a different leasing regime.

The court of appeals and district court correctly found that the franchisees did not demonstrate any lack of good faith in Tosco's offer of franchises to them, and that they cannot show that they have been treated in a discriminatory fashion.

E. The Court of Appeals Correctly Concluded That The Simmons Group Had Not Suffered Antitrust Injury and Lacked Antitrust Standing

The court of appeals did not err in concluding in its unpublished memorandum that the Simmons group had not suffered antitrust injury and lacked antitrust standing. The Simmons group fails to point to any split in the circuits on this issue. Indeed, they do not cite to any decision whatsoever holding that petroleum franchisees suffer a cognizable antitrust injury and have antitrust standing to sue in circumstances such as this. The Simmons petitioners suffered no antitrust injury and lacked standing to assert any such claims.

The Simmons group asserts that the transfer of the Union 76 franchise interests and premises to Tosco was an antitrust violation under Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits combinations in restraint of trade, and Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions that may lessen competition. An antitrust plaintiff must demonstrate that the injury in question is "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977). If relief is sought under Section 4, the plaintiff must demonstrate standing, which is tested by the application of a number of factors, which seek to assure, among other things, that the asserted damage is not a matter of mere speculation as far as the plaintiff is concerned, and that, even if there were some damage, the plaintiff is truly an appropriate person to assert it for antitrust purposes.

Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 103 S. Ct. 897, 908, 74 L. Ed. 2d 723 (1983); *R. C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc). Section 16 is not quite as demanding, but it at least requires a showing that there is a significant threat impending. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969).

Petitioner's first claimed injury — loss of the right under the PMPA to purchase and own their currently leased stations — is related to the structure of the acquisition; specifically, whether it violated the PMPA.[4] This alleged injury is unrelated

4. Ironically, it is the fact of the acquisition that allegedly gives rise to Appellants' asserted rights under the PMPA and California statute to buy their leased stations. In other words, but for the (Cont'd)

to any purported decrease in competition resulting from the acquisition. For example, if Unocal had sold its assets under an identical deal to a new market entrant, thereby resulting in no increase of market share, Petitioners would still have lost the asserted right to purchase their own stations. This alleged injury is not proximately caused by any asserted anticompetitive effects of the asset purchase. Clearly, it does not reflect "the type of loss that the claimed violations . . . would be likely to cause," and does not give rise to antitrust standing. *Brunswick*, 9 U.S. at 489. Moreover, there is not the slightest hint that Union Oil would have otherwise sold off its roughly $2,000,000,000 going concern in bits and pieces if it had not sold to Tosco, and that some benefit would thereby have been conferred upon the group members through individual offers of sale bu Union Oil to them.

The Simmons group argues that the court of appeals' opinion fails to address its other purported injury, namely, that the mere switch in franchisor might result in increased wholesale prices to them. (Simmons Pet. at 20). They are incorrect. The court of appeals specifically rejected that purported speculative injury. It stated, assuming the existence of additional market concentration for the sake of argument, that while "added concentration might threaten other wholesalers of gasoline, independent dealers, and consumers, there is little reason, and no evidence, to suggest that these franchisees are threatened by their own franchisor."[5] (Simmons Pet. App. at 39). The Court added:

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allegedly anticompetitive acquisition, Appellants could not claim the alleged right to purchase. Therefore, the alleged anticompetitive acts of Unocal and Tosco simultaneously create and injure the same right. Appellants have alleged irreconcilably inconsistent positions.

5. Respondents note that the Tosco sale did not increase market concentration given that Tosco occupied less than one percent of the relevant market before the acquisition.

> We understand the desire of the group's members to escape the strictures of a franchise relationship and to sally forth on their own, but there is no indication that the frustration of that desire threatens an antitrust injury. At best, the assertion that they may be harmed is rank speculation which does not disclose a significant threat. *See*, e.g. *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 582-87, 590-91, 592-95 (3rd Cir. 1979).

The court of appeals correctly observed that, even if the franchisor were able to charge higher prices, the "franchisees are actually allies of their franchisor as all of them face the marketing efforts of others." *Id.*

Indeed, the franchisees cannot claim to be affected either by a decrease in competition between Tosco and Unocal or by any alleged general decrease in competition within the wholesale motor fuel market. Prior to the acquisition, there was no competition between Tosco and Unocal (or any other supplier) in the supply of motor fuel to Petitioners. They do not dispute that they were, and remain, "76" brand franchisees, bound by their former and current franchise agreements to purchase all of their motor fuel requirements directly from their franchisor — formerly Unocal and now Tosco. Quite simply, they do not participate and have never participated in a competitive market for the purchase of wholesale motor fuel. Petitioners cannot allege injury for price increases in a market in which they were not participants. *See Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1252 (1997), *quoting Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985).

Thus, even assuming that at some point there is an increase in the price of the "76" brand wholesale motor fuel that petitioners are now obligated to purchase from Tosco, that increase would not be the result of a lessening in competition, because there is not and has never been any competition in the sale of "76" brand wholesale motor fuel to them. Therefore, the court of appeals correctly determined that the Simmons group's speculation about possible wholesale price increases cannot constitute a cognizable antitrust injury suffered by them.[6]

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6. Accordingly, Petitioners' argument that they stand in the position of consumers or customers of the merged entity is without merit. They are branded franchisees who do not purchase their motor fuel on the wholesale open market, as might an independent dealer or a wholesale gasoline distributor. The Simmons group's citation to *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555 (7th Cir. 1991) thus is inapposite. In *Nelson*, the plaintiffs were patients of a medical center that merged with the only other health care provider in plaintiffs' hometown of Monroe, Wisconsin — an entity which plaintiffs had previously sued. The merged entity then refused to treat them. The Seventh Circuit held that the defendant's decision not to treat them was a direct result of the exercise of its market power and that but for the merger and the resultant monopoly, the plaintiffs might still be enjoying medical care in Monroe. In contrast, these petitioners are not "consumers" directly harmed by any alleged elimination of competition. They are branded franchisees in the exact same position now as they were when Unocal was their franchisor. Similarly, there is nothing about the *California v. American Stores Company*, 495 U.S. 271 (1990), decision that suggests that the Simons petitioners possess antitrust standing.

CONCLUSION

The petitions for a writ of certiorari filed by the Simmons and Hindi petitioners should be denied.

Respectfully submitted,

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